(22,984)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 151.

ANNA M. BURBANK, WIFE OF JAMES M. WOODSON, AND JAMES M. WOODSON, EXECUTORS OF THE LAST WILL OF T. SCOTT BURBANK, AND INDIVIDUALLY, PLAINTIFFS IN ERROR,

vs.

MRS. JOSEPHINE ERNST, LEGAL TUTRIX OF THE MINOR, MARY SPRINGER BURBANK, ET. AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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1 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Civil District Court for the Parish of Orleans.

Petition of Nellie G. Burbank, Wife of William R. Dodge, et al.

Filed June 6th, 1910.

No. 93752.

Civil District Court, Division "C."

SUCCESSION OF T. SCOTT BURBANK.

To the Honorable the Civil District Court for the Parish of Orleans:

The petition of Mrs. Nellie G. Burbank, wife of William R. Dodge, and of the said William R. Dodge, for the purpose of aiding, authorizing and assisting his said wife, domiciled in this City, respectfully represents.

That Thomas Scott Burbank, a brother of your petitioner, the above named Mrs. Dodge, died in the City of Temple, State of Texas, on the 10th day of May, 1910, he being at that time and for many years previous thereto, a resident and domicilated in this
2 City, and State; that he left only one child named Mary Springer Burbank, aged about thirteen (13) years, and she is his sole and only heir; that the wife of said Burbank died several years ago.

Petitioner further shows that the said T. Scott Burbank was one of the children and heirs of the late E. W. Burbank, whose Succession was opened and is now pending in this Honorable Court under No. 88241 of the docket thereof and petitioner is one of the testamentary executors of the said estate and the same is now in course of administration; that it is necessary for the proper administration of the said estate of E. W. Burbank and the protection and preservation of the interest of the minor, Mary Springer Burbank, that she have a tutor appointed to her; that petitioner is informed that the said deceased left a certain document, said to have been executed in Texas, purporting to be his last will and testament but the same has not been filed in this Court and petitioner believes and therefore alleges and charges that the said document is not the last will and testament of the deceased and cannot be admitted to probate in this Court, because among other reasons, the same was not executed in accordance with the laws of this State, and petitioner is also informed that prior to the departure of the said deceased from this City for a temporary absence, he left another document purporting to be his last will and testament, but, the same has not been offered for probate in this court and petitioner is not advised whether the same

is in due and regular form and therefore entitled to probate, or whether the same has been revoked or not, but, at all events, as before alleged none of the said purported wills of the said deceased have been offered for probate though ample time has elapsed for the persons interested therein to have offered the same for probate; that as before alleged it is necessary that the minor child of the said deceased be legally represented; that petitioner has not
3 the qualifications to be tutrix of the said Minor, but, being a near relative to said minor, to-wit:—her paternal aunt, petitioner deems it her duty to take the necessary steps to have a tutor appointed to the said minor and, therefore, it is necessary that a family meeting be called to name and recommend to this Honorable Court a person to be appointed tutor of said minor; that it is also necessary to take an inventory of the property left by the deceased and owned by the said minor and also to appoint an under-tutor to the said minor; that William R. Dodge, petitioner's husband is a proper person to be such under-tutor.

Petitioner further shows that the following named parties are the only relatives of the deceased living in this Parish, or within the neighboring Parish not residing in a distance exceeding thirty miles from this city, to-wit:—

Dr. Oliver F. Ernst, Maternal Uncle.

Charles R. Ernst, Maternal Grand Uncle.

J. A. Burbank, Paternal Second Cousin.

Thomas S. Burbank, Paternal Second Cousin, and are therefore competent to be members of said family meeting; that the following are friends of the said minor and are competent to be members of the said family meeting, to-wit:—Louis J. D'Aquin and John J. Lawrence.

The premises considered petitioner prays that an inventory of the property left by the deceased, Thomas Scott Burbank, and now owned and inherited by his minor child Mary Springer Burbank, be taken by W. Mc L. Fayssoux, Notary Public, assisted by appraisers to be appointed by this Honorable Court; that a family meeting composed of the persons herein above named, or of any five of them, be ordered held before W. McL. Fayssoux, Notary Public for the purpose of nominating and recommending to this
4 Honorable Court a proper person to be Tutor of the said Minor; that William R. Dodge be appointed under-tutor of said Minor and petitioner further prays for all necessary orders and general and equitable relief.

(Sg.) J. ZACH SPEARING, *Att'y.*

Affidavit.

Before me the undersigned authority personally came and appeared, Mrs. Nellie G. Dodge and William R. Dodge, who being duly sworn, depose and say:

That all the allegations in the above and foregoing petition are true and correct.

(Sg.) NELLIE G. BURBANK DODGE,
W. R. DODGE.

Sworn to and subscribed before me this 4th day of June, 1910 at the City of New Orleans, State of Louisiana.

(Sg.) J. ZACH SPEARING,
[SEAL.] *Not. Pub.*

Order.

Let a family meeting be composed of the persons named in the above and foregoing petition, or any five of them, be held before W. Mc L. Fayssoux, Notary Public, for the purpose of nominating and recommending to this Court a proper person to be Tutor of the Minor Mary Springer Burbank, and,

Let an inventory of the property left by T. Scott Burbank and inherited and now owned by the minor, Mary Springer Burbank, be taken by W. Mc L. Fayssoux, and,

Let Eug. Thorpe and C. J. Cocke be and they are hereby appointed appraisers to value and appraise the said property, and,

Let William R. Dodge be and he is hereby appointed under-tutor of the minor, Mary Springer Burbank.

New Orleans, La. June 6th, 1910.

(Sg.) E. K. SKINNER, *Judge.*

Petition of Chas. S. Rice, Esq., as Amicus Curiæ, Alleging Want of Jurisdiction.

Filed June 10, 1010.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

And now comes Charles S. Rice, of New Orleans, Attorney-at-Law, and as Amicus Curiæ, and gives the court to understand and be informed that T. Scott Burbank, was not, at the time of his decease, on May 10th, 1910, a resident of or domiciled in the State of Louisiana; but was a resident and citizen of the State of Texas, where he made his last will, which will was to have been proved in the proper court in Texas on June 7th, 1910, and appearer believes to have been already admitted to probate, according to law,—and that a copy of the proceedings and will as well as of those appointing a guardian for the minor, Mary Springer Burbank, will be, within a brief delay, furnished appearer, in order to the opening of deceased's succession in this Honorable Court, and to have said minor legally represented therein.

That this Honorable Court is by reason of said minor's domicile without jurisdiction to appoint a tutor herein; and

that appearer so informs the court, in order to the avoidance of confusion and the inadvertant doing of acts beyond its authority and jurisdictions.

Order.

Let the foregoing appearance of Chas. S. Rice, as Amicus Curiæ be filed.

New Orleans, La., June 10, 1910.

(Sg.) E. K. SKINNER, *Judge.*

Petition of Mrs. Josephine Ernst to be Appointed Tutrix of the Minor.

Filed June 10, 1910.

No. 93752.

Civil District Court, Division "C."

SUCCESSION OF T. SCOTT BURBANK.

To the Honorable the Judges of the Civil District Court in and for the Parish of Orleans:

The petition of Mrs. Josephine Fuessel, widow of the late Felix Ernst, and a resident of the City of New Orleans, respectfully shows:—

That petitioner is a resident of the City of New Orleans and also has a home and residence in Ocean Springs, Mississippi:

That petitioner is the maternal grandmother of the minor Mary S. Burbank.

7 That petitioner is entitled to the tutorship of said minor and hereby applies to be appointed and confirmed in the said trust;

That petitioner opposes the proceedings heretofore taken herein by Mrs. Nellie G. Burbank, wife of William R. Dodge, averring that said proceedings are unnecessary under the circumstance, and petitioner protests that a family meeting should not be convened to select a tutor, inasmuch as petitioner is entitled under the law thereto; but, reserving this question and not waiving the same, petitioner avers that even if a family meeting is necessary the applicant has left off the following names of relatives to serve on said family meeting, to-wit:—

Edward Ernst, a grand uncle of the minor, and Andrew L. Ernst, the maternal uncle of the minor, both of whom are residents of New Orleans and competent to serve on the family meeting, and these names should be added to said family meeting if it should be determined that one is necessary to be held.

Wherefore, petitioner prays that she may be recognized and appointed and confirmed as Tutrix of the minor Mary S. Burbank

and that letters issue to petitioner upon complying with the requisites of law; that if it should be held that a family meeting is necessary in this case, in that event the names hereinabove given should be added to the said family meeting, and petitioner prays for such other and further orders as the case requires and for all general and equitable relief.

(Sg.) MRS. JOSEPHINE ERNST.
(Sg.) DART, KERNAN & DART, *Attorneys.*

Affidavit.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Before me, the undersigned authority, personally came
8 and appeared, Mrs. Josephine Faessel, widow of Felix Ernst, who, being by me first duly sworn, deposes and says that all the facts and allegations in the foregoing petition contained are true and correct.

(Sg.) MRS. JOSEPHINE ERNST.

Sworn to and subscribed before me this 10th, day of June, 1910.
(Signed) W. W. YOUNG, *Not. Pub.*

Rule of Mrs. Josephine Faessel, Widow of Felix Ernst, to Rescind Order for a Family Meeting.

Filed June 10, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

On motion of Mrs. Josephine Faessel, widow of Felix Ernst, and Dart & Kernan & Dart, attorneys, for mover, and upon suggesting that mover is the maternal grandmother of the minor, Mary S. Burbank; that mover has made application to be appointed and confirmed as tutrix of said minor, as under the law she is entitled to such appointment; that a family meeting is unnecessary under the circumstances, but if one is to be held that the names of two relatives of the minor residing in the City of New Orleans should be added to the list of the family meeting;

It is ordered by the Court that Mrs. Nellie G. Burbank, wife of William R. Dodge, do show cause on Friday 17th, day of
9 June, 1910, at 11 o'clock A. M., why the order for a family meeting heretofore entered herein should not be rescinded and why petitioner should not be appointed tutrix of the minor Mary S. Burbank, and, in any event, why the names of Edward

Ernst, a granduncle of the minor, and Andrew L. Ernst, the maternal uncle of the minor, should not be added to the names of persons heretofore ordered to attend said family meeting and why such other and further relief as the case permits should not be granted.

Judgment on Rule to Rescind Order for Family Meeting, Rendered and Signed June 17th, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

The rule herein taken by Josephine Ernst on June 10, 1910, came on this day for trial. Present: Henry P. Dart, Jr., for mover in rule. J. Zach Spearing for defendant in rule. Chas. S. Rice, Amicus Curiæ.

When after hearing pleadings, evidence and counsel, the court considering the law to be with mover and for the reasons orally assigned; It is ordered, adjudged and decreed that said rule be made absolute, that the copy of the proces verbal of the deliberations of the family meeting herein held before Wm. Mc.L. Fayssoux, Not. Pub. be filed for reference, that the mover, Mrs. Josephine Faessel Ernst be and she is hereby appointed legal tutrix of her minor grandchild, Mary S. Burbank, that an inventory of the estate and property of said minor be taken by Wm. McL. Fayssoux, Not. Pub., assisted by Eug. Thorpe and C. J. Cocke, appraisers, and after due recordation of her bond as tutrix and on her taking the oath as prescribed by law letters as such issue to her.

Rendered, read and signed in open Court this 17th June 1910.

(Sg.) E. K. SKINNER, *Judge.*

10 *Petition With Family Meeting.*

Filed June 17th, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

The petition of Mrs. Nellie G. Dodge, and of Wm. R. Dodge for the purpose of authorizing and assisting his said wife, respectfully Represents:

That pursuant to an order of this Honorable Court rendered in these proceedings on the 6th day of June, 1910, a family meeting on behalf of the minor, Mary Springer Burbank was held before

W. McL. Fayssoux, Notary Public on the 14th day of June, 1910, for the purpose of nominating and recommending to this Honorable Court a person to be Tutor of said Minor; that five of the members of said Family Meeting recommended Mrs. Josephine Ernst to be tutor of said Minor and one of the members of the said Family Meeting recommended J. A. Burbank as such Tutor and William R. Dodge, Under-Tutor of said minor concurred in the recommendation of the majority of the said meeting provided the said Mrs. Ernst has the legal qualifications to be tutrix of the said Minor, all as the same will more fully appear by reference to the proceedings of said family meeting, a duly certified copy of which is hereto annexed and made part hereof.

Petitioner further shows that Mr. Charles S. Rice, attorney for Mr. & Mrs. James N. Woodson filed a protest against the holding of said family meeting, as the same will more fully appear by reference to the proceedings in writing, a copy of which is annexed to the copy of the proceedings of the said family meeting filed herewith.

Petitioner further shows that she files the said copies for such action as the court may hereafter determine and petitioner reserves her right to object to the appointment of the said Mrs. Ernst as Tutrix of the Said Minor.

The premises considered petitioner prays that she be permitted to file a copy of the proceedings of the said family meeting and of said protest and for all, equitable and general relief.

(Sg.) J. ZACH SPEARING, *Att'y.*

Order.

Let the copy of the proceedings of the family meeting referred to in the above and foregoing petition and in the protest referred to therein be filed as prayed for.

New Orleans, La., June 17th, 1910.

(Sg.) E. K. SKINNER, *Judge.*

Family Meeting (Copy) on Behalf of the Minor Mary Springer Burbank and Copy of Letter of Protest to the Holding of Said Meeting Attached.

Filed June 17th, 1910.

June 14th, 1910.

Family Meeting on Behalf of the Minor, Mary Springer Burbank.

SUCCESSION OF T. SCOTT BURBANK.

No. 93752, Civil District Court.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans,
City of New Orleans:

Be it known, That on this fourteenth day of June, in the year of our Lord One thousand nine hundred and ten, By virtue of and

pursuant to an order of the Honorable the Civil District Court of this Parish, dated June 6th, 1910, and rendered in the matter of the Succession of T. Scott Burbank, No. 93752 of the docket of the said Court rendered on the petition of Mrs. Nellie G. Burbank, wife of William R. Dodge, directing that a family meeting of the relatives of the said minor and of friends of said minor in default of relatives residing in the circle prescribed by law, be convened for the purpose of deliberating and giving their opinion and advice on the subject matter of said petition, a duly certified copy of which petition and order of court is annexed to an inventory in the Succession of T. Scott Burbank, before me, Notary, dated June 13th, 1910, as part hereof.

Before me, William McLellan Fayssoux, a Notary Public in and for the said Parish of Orleans, duly commissioned and qualified.

Personally came and appeared in my office in the Masonic Temple, in this city, at the hour of 8 o'clock, P. M., Dr. Oliver S. Ernst, maternal uncle and Messrs. Charles R. Ernst, maternal grand uncle, J. A. Burbank, paternal second cousin and Louis J. D'Aquin and John J. Lawrence, friends of said minor in default of relatives, all mentioned in said order as persons to compose said family meeting (the other party named in said order to compose said family meeting, to-wit: Thomas S. Burbank, paternal second cousin, although by me Notary duly notified according to law of the time and place of said meeting and requested to be present, did not attend) and William R. Dodge, under-tutor of said minor all of whom acknowledge to have received from me, Notary, three clear days previous notice in writing of this meeting.

And the said members of said family meeting having been first by me duly sworn, did then and there, in the presence of me, Notary, and the said under-tutor of said minor, and the witnesses hereinafter named, constitute and form themselves into a family meeting in the interest of said minor for the purposes set forth in said petition, which petition and order of court I said Notary did read and explain to them.

And I said Notary did read unto the members of the said family meeting a certain letter from Mr. Charles S. Rice, attorney-at-Law, addressed to me and dated June 14th, 1910, which said letter is hereto annexed and made part hereof.

All of which being done the said members of said family meeting declared that they are well and sufficiently informed of the matter before them as members of this family meeting.

And after having consulted and advised together in the interest of said minor on the matter before said meeting, the following named members of said meeting, to-wit: Dr. Oliver F. Ernst, Charles R. Ernst, J. A. Burbank, and John J. Lawrence declared that in their opinion, Mrs. Josephine Ernst is a proper person to be tutor of said minor and they recommended her to the Civil District Court to be appointed as Tutor of said Minor.

And Louis J. D'Aquin, the other member of said Family meeting declared that in his opinion, J. A. Burbank, is a proper person to be tutor of said minor and he recommends said J. A. Burbank to the Civil District Court to be appointed Tutor of said Minor.

And the said William R. Dodge, under tutor of said minor having been present throughout the deliberations of said family meeting declares that he concurs in the above set forth opinion and recommendation and of the majority of said meeting, approves the same and joins the majority of the members of said meeting in said recommendation, provided said Mrs. Ernst has the legal qualification to be Tutrix of said Minor.

Thus done, Deliberated and closed in my office at the said city of New Orleans, on the day, month and year first above written, in the presence of Messrs. Walter W. Janin and James Druhan, competent male witnesses, who signed these presents with said members of said family meeting and said under-tutor, and me, Notary, after due reading of the whole.

(Original signed) O. F. ERNST, *M. D.*
CHAS. R. ERNST.
J. A. BURBANK.
LOUIS J. D'AQUIN.
JNO. J. LAWRENCE.
W. McL. FAYSSOUX, *Not. Pub.*

WALTER W. JANIN.
JAMES DRUHAN.

A true copy of the original, New Orleans, La. June 15, 1910.
(Sg.) W. McL. FAYSSOUX,
[SEAL] *Not. Pub.*

11 *Letter from Mr. Rice Protesting on Behalf of Dr. James M. Woodson and Wife to the Holding of a Family Meeting Before W. McL. Fayssoux, Notary, Attached to the Proces Verbal of Said Family Meeting.*

(Letter Head of Rice & Montgomery.)

NEW ORLEANS, LA., *June* 14, 1910.

W. McL. Fayssoux, Esq., Notary Public, Masonic Temple, City.

MY DEAR SIR: I understand that it is appointed that a family meeting in the succession of T. Scott Burbank to advise with reference to the appointment of a Tutor to his minor child, Mary Springer Burbank, is fixed to be held today. I am employed by Dr. James M. Woodson and his wife, who are the executors under the last will of T. Scott Burbank, made in Texas, on or about March 18th, last, to represent them in probate proceedings in the Civil District Court of this Parish, and shall do so as soon as proper copies of the proceedings in Texas shall reach me. By his will he declares the fact to be that he was a citizen and resident of the State of Texas, which fact fixes the domicile of the minor in Texas, and, therefore, the Courts of this State are without authority to appoint a tutor for her.

Therefore, I desire to file this my client's protest against any family meeting or other proceedings being had looking to the ap-

pointment of a Tutor, dative or otherwise, in this State, reserving all rights, whether those stated above or others, should said proceedings be persisted in.

I, therefore, respectfully request that should said meeting be held, this my protest be attached to the proces verbal thereof, note being made therein of the same and a copy hereof made part of any copy furnished by you.

With highest consideration, I am,

Very truly yours,

(Sg.) W. McL. FAYSSOUX,
Not. Pub.

I, the undersigned Notary Public do hereby certify that the writing on the reverse hereof is a true and correct copy of the original letter which is annexed to a family meeting on behalf of the Minor, Mary Springer Burbank, held before me on June 14th, 1910.

New Orleans, La., June 15th, 1910.

(Sg.) W. McL. FAYSSOUX, *Not. Pub.*

12 *Opposition of Mrs. Nellie G. Burbank, Wife of William R. Dodge.*

Filed June 17th, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

The petition of opposition of Mrs. Nellie G. Burbank, wife of William R. Dodge, and of the said William R. Dodge, for the purpose of aiding, authorizing and assisting his said wife, residents of the City of New Orleans, respectfully represents.

That opponent is one of the Testamentary Executors of the estate of E. W. Burbank and as such has an interest in seeing that the minor, Mary Springer Burbank is properly represented; that opponent opposes the application filed in these proceedings by Mrs. Josephine Ernst, widow of the late Felix Ernst to be appointed Tutrix of the minor, Mary Springer Burbank, on the ground that the said Mrs. Ernst is not a resident of or domiciled in the City of New Orleans or any part in the State of Louisiana, but, on the contrary, opponent alleges that the said Mrs. Ernst is a resident of and domiciled in the State of Mississippi and therefore she has not the legal qualifications to be Tutrix of said Minor and cannot be appointed as such.

Wherefore opponent prays that the application of the said Mrs. Ernst to be appointed Tutrix of the said Minor be denied and refused at her costs and for all equitable and general relief.

(Sg.) J. ZACH SPEARING, *Att'y.*

13 *Answer of Mrs. Nellie G. Burbank, Wife of W. R. Dodge to Rule to Rescind Order for Family Meeting.*

Filed June 17th, 1910.

Civil District Court, Division "C".

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Now comes Mrs. Nellie G. Burbank, wife of William R. Dodge, and the said William R. Dodge for the purpose of aiding, authorizing and assisting his said wife and for answer and return to the said rule herein taken by Mrs. Josephine Ernst admits that the said Mrs. Ernst is the maternal grand mother of the minor, Mary Springer Burbank, but, Respondent denies that the said Mrs. Ernst is a resident of or domiciled in the City of New Orleans, or any point in the State of Louisiana, but, on the contrary, Respondent alleges that the said Mrs. Ernst is a resident of and domiciled in the State of Mississippi and therefore she has not the legal qualifications to be tutrix of said Minor and cannot be appointed as such.

For further answer and return Respondent also denies that Edward Ernst a Grand Uncle of the Minor and Andrew L. Ernst, a maternal uncle of the Minor are residents of the Parish of Orleans or within the circle prescribed by law as a necessary qualification to be a member of the family meeting.

Wherefore respondent prays that after due trial this return and answer be maintained and the rule herein taken by the said Mrs. Ernst be discharged at her costs and for all equitable and general relief.

(Sg.) J. ZACH SPEARING, *Att'y.*

14 *Petition of Mrs. Josephine Ernst, Tutrix, Filing Inventory & Order.*

Filed June 20, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

To the Honorable the Judges of the Civil District Court for the Parish of Orleans:

The petition of Josephine Ernst, Tutrix of the minor Mary S. Burbank,

Respectfully shows:

That pursuant to the orders heretofore entered herein an inventory of the minors estate has been made and the same is herewith filed.

That petitioner's bond should be fixed and determined.

Wherefore petitioner prays that the inventory of the estate of the Minor Mary S. Burbank taken by Wm. Mc L. Fayssoux, on 18, June, 1910 may be filed and that petitioner's bond be fixed and for such other and further orders as the case requires.

(Sg.) DART, KERNAN & DART, *Att'ys.*

Order.

Let the inventory taken by Wm. Mc L. Fayssoux, N. P. on 18 June, 1910 be filed herein and let the petitioner's bond be fixed at the sum of Fifty thousand ($50,000.00) Dollars.

New Orleans June 20, 1910.

(Sg.) E. K. SKINNER, *Judge.*

15 *Recapitulation of Inventory.*

Estate of E. W. Burbank.	Interest of T. Scott Burbank.	
Household Furniture	581.00	145.25
Jewelry at Residence	1.00	.25
Jewelry at Bank	10.10	2.53
Promissory Notes	14,500.00	3,625.00
Capital Stock	53,750.00	13,437.50
Bonds	164,344.00	41,086.00
Office Furniture	26.00	6.50
Claims in Litigation	30,000.00	7,500.00
Real Estate	86,000.00	21,500.00
Cash	51,690.42	12,922.60
	$400,902.52	$100,225.63

Total Appraisement of the Property of T. Scott Burbank and of the Minor Mary S. Burbank, One Hundred Thousand Two Hundred and Twenty Five & 63/100 ($100,225.63) Dollars $100,225.63.

Thus Done, Inventoried, Appraised and Closed, in the said City of New Orleans, in the presence of the said parties appraisers, and witnesses, who hereunto sign their names with me, Notary, on the day, month and year first above written, after due reading of the whole.

(Original Signed) Mrs. JOSEPHINE ERNST.
W. R. DODGE.
EUGENE THORPE.
C. J. COOKE.
W. McL. FAYSSOUX, *Not. Pub.*

HENRY P. DART.
J. ZACH SPEARING.

16 A true copy of the original.
New Orleans, La. June 18th, 1910.

(Sg.) W. Mc L. FAYSSOUX,
[SEAL.] *Not. Pub.*

Petition of Foreign Executors for Recognition &c. and Copy of Record.

Filed June 22, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

The petition of Anna Burbank Woodson, wife of James M. Woodson, and of said James M. Woodson for himself and to authorize his said wife, residents of and domiciled in the City of Temple, County of Bell, State of Texas, duly appointed therein by a Court of competent jurisdiction, and qualified, respectively as Executrix and Executor of the last will and testament of T. Scott Burbank, above named, respectfully shows:—

That said T. Scott Burbank, late a resident of, domiciled in and a citizen of the State of Texas, departed this life in said City of Temple, on say the 10th day of May, 1910, leaving an estate and property situated partly in said State of Texas, and partly in the State of Louisiana, within the jurisdiction of this Honorable Court.

That the said T. Scott Burbank left his certain last will
17 and testament confected in said county of Bell, dated the 22nd., day of March, 1910, wherein among other things, he declared his residence and permanent home to be in said County of Bell, State of Texas and that he was a cit-zen of that State; that in said last will the said T. Scott Burbank, testator, named, constituted and appointed your petitioners, to be, respectively, Executrix and Executor thereof, without bond or other security, and with seizin and authority to possess and hold, for the purposes of said last will, all of the property of said estate.

That said last will conforms in every respect to the law of Texas, where the same was made, both as to form and to the dispositions therein made and the requirements thereof.

That said last will has been filed in and was duly admitted to proof and probate in the County Court of said County of Bell, State of Texas, a Court of Record and competent jurisdiction, on say the 14th, day of June, 1910, and at the June terms thereof, upon due pleading and application in writing by your petitioners: and by judgment rendered in said proceedings the said will was among other things decreed and adjudged by the said Court to be the last will an testament of said deceased; to have been execute under all the forms and solemnities required by the laws of said State, to constitute a valid last will and testament; and when he executed said last will, said testator was of sound and disposing mind and memory, and resided in said County of Bell, State of Texas, as his place of domicile and was a citizen of said state; and that said court had jurisdiction of his estate; and that your petitioners were in no way disqualified, but in all other things

possessed of the necessary qualities, respectively, as Executrix and Executor of said last will; and did order, adjudge and decree that said last will be thereby admitted to probate and record; and that your petitioners be recognized, respectively, as Executrix
18 and Executor thereof; and that no bond or security be had or required of either of them, as such executrix or executor; that they have all the powers and authority granted and conferred upon them by the terms and effect of said last will; and that upon the taking of the oath required by law, Letters Testamentary should issue to them.

That, thereupon, your petitioners took and subscribed to the said oath, as required by law; and Letters Testamentary in conformity to said judgment and the laws of the State of Texas issued to them.

That for greater certainty and fuller exhibition of the proceedings had in, and of the said judgment rendered in said probate proceedings in said County Court, County of Bell, State of Texas, petitioners present and file herewith a copy of all the proceedings had in the said cause or application, duly exemplified according to Act of Congress for use in another State, and make the same a part of this petition.

And your petitioners represent further, that in order to comply with the requirements of said testators, as set forth in said last will, and to remove the property situated in the State of Louisiana for further and necessary administration to the said court in Texas, where the estate of said deceased is being principally administered, it is requisite that proceedings ancillary thereto, be had for that purpose in this Honorable Court, to the end that the debts and obligations of the deceased, within the State of Louisiana, if any there are, shall be paid and satisfied and the authority of the court be had for transferring the said Estate in Louisiana, — the proceeds thereof, and effects thereto belonging, or the residue thereof to said County Court, of the County of Bell, and State of Texas, through your petitioners as Executrix and Executor of said last will and testament of said deceased.

19 Wherefore, petitioners pray the premises considered, that they, your petitioners, be recognized as respectively, Executrix and Executor of the said last will and testament of said T. Scott Burbank, deceased; that said last will by said copy thereof hereto attached be duly registered; and that, upon taking and filing Inventory and giving bond as required by law, your petitioners be recognized as respectively, Executrix and Executor of the last will and testament of said deceased with power to administer, as ancilliary to said principal administration, now being had in said Court in the State of Texas, the estate of said deceased in the State of Louisiana, And they pray for all general relief.

(Sg.) RICE & MONTGOMERY,
Of Counsel.
ALFRED E. BILLINGS,
Of Counsel.

Order.

Let the petitioners, Anna Burbank Woodson and James M. Woodson, named in foregoing petition, be recognized as, respectively, Executrix and Executor, with seisin, of the last will and testament of said T. Scott Burbank, deceased, with power and authority, upon the making and filing of an inventory herein and on giving bond as required by law, to administer and execute said last will as such Executrix and Executor the estate and succession of said deceased in the State of Louisiana, and as ancilliary to the principal administration of his estate in said county Court, of the County of Bell, State of Texas. Let an Inventory of the effects of said deceased in the Parish of Orleans, be taken by Alexis Brian, Notary Public in and for said Parish, assisted by competent appraisers, duly appointed and sworn; and let the said last will, by exemplified copy thereof so filed with and made part of said petition, be registered, as by law required.

New Orleans, La. June — 1910.

——— ———, *Judge.*

20 *Exemplified Copy of Record of County Court of Bell County Texas Filed with and made part of the Foregoing Petition.*

Filed June 22nd, 1910.

Application to Probate Will and for Letters.

In the County Court, Bell County, Texas, to the June Term, 1910.

THE STATE OF TEXAS,
County of Bell.

To the Honorable W. S. Shipp, Judge of said Court:

J. M. Woodson and Anna Burbank Woodson, now come and represent to the court that they reside in the County of Bell and State of Texas; that they are not in law, or in any manner, disqualified from acting as Executor and Executrix, respectively, of the last will and testament of T .Scott Burbank, deceased, the Testator hereinafter referred to, nor are they disqualified to accept or perform any of the trusts, obligations, duties or powers, that may be vested in, or imposed upon, them by the terms of said last will and testament, but on the contrary, they are in law and in all things qualified.

They further represent that T. Scott Burbank while a citizen of the State of Texas, and a resident of the County of Bell, and State of Texas, executed a valid and legal last will and testament, the same being executed under all the formalities and solemnities required by the laws of the State of Texas, to make and constitute a valid and legal last will and testament, and said will and testament

was by the said T. Scott Burbank so executed on the 22nd, day of March A. D., 1910; that said T. Scott Burbank is now dead, that he died in the County of Bell in the State of Texas on the 10th day of May, A. D., 1910; that the said T. Scott Burbank at the time of his death was an inhabitant and citizen of the State of Texas, and that at the time of his death and prior thereto, he resided
21 in the County of Bell, and State of Texas, and that he left an estate consisting of personal and other property, the greater portion of which at the time of his death was and is now, situated and located in the County of Bell, and State of Texas. The probable value of the estate of said deceased is three hundred and fifty thousand ($350,000.00) dollars; that said deceased, T. Scott Burbank, left a valid and legal last will and testament as aforesaid, and by the terms of which these applicants, J. M. Woodson and Anna Burbank Woodson were appointed Executor and Executrix respectively, of said last will and testament; neither of whom were by the terms of said will required to give bond or security, but by the terms of said will, Bond and security was waived and by the terms of said will it was provided that no proceedings be had in this court, or in any of the courts of the country, in the administration of said estate, further than to probate said will and to file an inventory and appraisement of said estate. Said will by its terms giving these applicants full power as independent Executor and Executrix, and also appointing said Anna Burbank Woodson, Guardian of the person of Mary Springer Burbank, the daughter of said deceased, a minor.

That these applicants, said J. M. Woodson and Anna Burbank Woodson, or neither of them disqualified, but are on the contrary in law and in all things qualified to act and be appointed Executor and Executrix, as aforesaid, and to perform all the trusts and obligations and duties vested in, and imposed upon, them by the terms of said will and by virtue of such appointment.

Wherefore they pray that due notice and citation be given and posted on this application, and that upon hearing hereof, said will be admitted to probate and record as the last will and testament of said T. Scott Burbank, deceased, and that they be appointed Executor and Executrix, respectively, of said last will and
22 testament and said Anna Burbank Woodson be appointed Guardian of the person of the said Mary Springer Burbank, with all the powers and authorities granted, or intended, by the terms and effect of said will; and they pray for all such other and further proceedings, order and decrees, that may be proper or in requisite in the premises.

(Signed) W. S. BANKS,
Attorney for J. M. Woodson and Anna Burbank Woodson, Applicants.

Filed May 12th, 1910, Hugh Harris, County Clerk, Bell County, Texas by C. K. White, Deputy.

Will.

THE STATE OF TEXAS,
County of Bell.

I, T. Scott Burbank, being of sound and disposing mind and memory, do make, constitute and publish, this my last will and testament, hereby revoking all other wills by me at any time heretofore made.

(1) I direct that out of my estate and as soon after my death as practicable, my Executor and Executrix hereinafter named, shall pay all my just debts, if any, including the expense of my funeral and illness.

(2) Subject to the control of my executor and Executrix, hereinafter provided and subject to the time of delivery of same by my said executor and Executrix to her as specified and set out in the following *Fourth* Paragraph of this will, and subject to the provisions set out and contained in the *Fifth* Paragraph of this Will, I will and bequeath unto my daughter, Mary Springer Burbank, all and every my property and estate, real, personal and mixed, and
23 wheresoever situated; to have and to hold the same unto her and, subject to the provisions of said paragraph Five, unto her heirs and assigns forever.

(3) I name, constitute and appoint, J. M. Woodson and his wife, Anna Burbank Woodson, both of Bell County, Texas, Executor and Executrix, respectively, of this my last will and testament, and direct that no bond or security shall be had or required of either of them as such Executor and Executrix, and I also will and direct that no proceedings be had in the County Court, or in any of the Courts of the Country in the administration of my estate, further than to probate this my last will and testament and return an inventory and appraisement of my estate; and I authorize and empower my said Executor and Executrix, to sell, mortgage, or hypothecate any or all of the lands, premises or property, belonging to my estate, that shall to them appear to be the best interest of my estate. And they shall invest the funds and assets of my estate and may change investment and re-invest same and make all transfers, sales, conveyances, hypothecations, mortgages or other conveyances, as in their judgment may seem for the best interest of my estate.

(4) I will and direct that my said Executor and Executrix from time to time, and as may be required pay over to the guardian of the person of my said daughter, Mary Springer Burbank, for the support, maintenance, education and culture, of my said daughter, such sums and amounts out of my estate, as shall in their discretion and the discretion of the guardian of the person of my said daughter be proper and appropriate for the support, maintenance, education and culture of my said daughter, in a manner befitting and consistent with her status in society, until my said daughter is twenty one years of age or marries. All my said estate, except such
24 amounts as are so paid to the guardian of the person of my said daughter, shall be held by my said Executor and Execu-

trix for the following time, and to be paid and delivered to my said daughter as follows, that is to say; when my said daughter, Mary Springer Burbank, arrives at the age of twenty one (21) years, they shall out of my said estate pay and deliver to her the sum of twenty thousand ($20,000.00) dollars; One half (½) of the remainder of my said estate shall be paid and delivered to my said daughter when she arrives at the age of twenty five (25) years, and the remainder of my said estate shall be paid and delivered to my said daughter when she arrives at the age of thirty (30) years.

(5) Should my said daughter, Mary Springer Burbank, die without leaving any child or children living, then such of my said estate as then remains whether the same has been paid over and delivered to said Mary Springer Burbank, or not, shall go, to and and become the property of, and I here will and direct that the same go to and become the property of, my sisters and in the amounts and as now here named, that is to say; One hundred ($100.00) dollars of same to go to Nellie Burbank Dodge, one half (½) of the remainder to Mamie Burbank De Silva, and the other one half (½) to said Anna Burbank Woodson. This provision however, is not intended to nor shall it have the effect to operate as any restraint upon my said daughter selling or mortgaging any of said property.

(6) Should said J. M. Woodson, my executor, hereinbefore named, or Anna Burbank Woodson, my executrix, hereinbefore named, die or fail or refuse to act as such executor or executrix, or from or on account of illness, mental or physical incapacity, or other cause, become disqualified from acting as such executor or executrix, then the survivor, and the one not so refusing or being disqualified from acting, shall be executor, or executrix, as the case may be, of this my last will and testament and have all the powers, authority, discretions and rights, and be subject to all the duties and obligations hereby vested in and imposed upon, both of them and may act with all the binding effect, and do all the acts, that both of them under the terms hereof could do.

(7) I hereby appoint said Anna Burbank Woodson (she being my sister) Guardian of the person of my said daughter, Mary Spinger Burbank, and direct and require that she have control over the persons of my said daughter, and the support, raising, education, maintenance and culture of my said daughter until she my said daughter Mary Springer Burbank is twenty one (21) years of age, or marries, and that she, said Anna Burbank Woodson, see that my said daughter is supported, maintained and educated in a manner, befitting and in accordance with her status in society.

In case of the death of said Anna Burbank Woodson or in case she refuses to act as such guardian or in case of from mental or physical disability she becomes disqualified to act as such Guardian, I name and appoint said J. M. Woodson, as the Guardian of the person of my said daughter, with all the powers and subject to all the duties hereby vested in and imposed upon said Anna Burbank Woodson.

(8) I hereby declare and state that my residence is in the County

of Bell and State of Texas, which is my permanent home, and that I am a citizen of the State of Texas.

In witness whereof I have subscribed my name hereto in the presence of W. S. Rowland and A. J. Jarrell, who subscribe their names as attesting witnesses at my request and in my presence, and in the presence of each other, this 22nd, day of March, A. D.
26 1910.

T. SCOTT BURBANK.

We, W. S. Rowland, and A. J. Jarrell, at the request of T. Scott Burbank, the testator who subscribed the foregoing will, subscribe our names hereto as attesting witnesses in his presence and in the presence of each other, and he the said T. Scott Burbank subscribed his name to the said foregoing last will and testament in our presence, this 22nd day of March, A. D. 1910.

A. J. JARRELL.
(Sg.) W. S. ROWLAND.

Filed May 12th, 1910, Hugh Harris, County Clerk, Bell County, Texas, by C. K. White, Deputy.

Notice of Application for Probate of Will.

No. 783.

The State of Texas to the sheriff or any constable of Bell county, Greeting:

You are hereby commanded to cause to be posted (for Ten days, exclusive of the day of posting, before the return day hereof), in three of the most public places in Bell County, one of which shall be at the Court House door, and no two of which shall be in the same city or town, copies of the following notice.

The State of Texas to all persons interested in the estate of T. Scott Burbank, deceased:

J. M. Woodson and Anna Burbank Woodson have filed in the County Court of Bell County, an application for probate of will — T. Scott Burbank, which shall be heard at the next terms of said court, commencing the first Monday in June, 1910, at the Court House thereof, in Belton Texas, at which time all persons interested in said estate may appear and contest said application, should
27 they desire to do so.

Herein fail not, but have you then and there before said court the writ, with your return thereon endorsed, showing how you have executed the same.

(Witness:)

HUGH HARRIS,
Clerk County Court, Bell County.

Given under my hand and the seal of said court, this 12th day of May, 1910.

HUGH HARRIS,
Clerk County Court, Bell County, Texas.
By C. K. WHITE, *Deputy.*

Sheriff's Return.

Came to hand on the 12th day of May, 1910 at 10 o'clock A. M., and executed on the 12th day of May, 1910, by posting copies of the within notice at three of the most public places in Bell County Texas, one of which was at the Court House door of said County, one at Temple, and one at Rogers no two of which places are in the same city or town.

D. C. BURKES,
Sheriff Bell County, Texas.
By D. M. KAY, *Deputy.*

Fees:

Posting Notices	$1.00
Mileage Miles	$2.00
Total	$3.00

Endorsements: No. 783. Estate of T. Scott Burbank, deceased. Notice of Application for Probate of Will. Issued May 12th, 1910. Hugh Harris, Clerk County Court. Bell County, Texas, by C. K. White, Deputy. Returned and filed the 12th day of May 1910 and recorded the — day of ——, 191-, in the Probate Minutes of County, in Volume — page —. Hugh Harris, County Clerk, Bell County, Texas, by W. S. Harris, Deputy.

Proof of Will.

No. 783.

In Re Estate of T. SCOTT BURBANK, Deceased.

In the County Court of Bell County, Texas, Sitting in Matters of Probate.

On this 14th day of June, 1910, in open court at a regular term of said court, upon the hearing of the application of J. M. Woodson and Anna Burbank Woodson to probate the last will and Testament of T. Scott Burbank, deceased, came in open court the witnesses, W. S. Rowland and A. J. Jarrell, who being duly sworn to tell the truth, the whole truth and nothing but the truth, did in open court depose and swear as follows:—

They and each of them swear that they knew the deceased, T.

Scott Burbank, and that they knew him on the 22nd day of March, A. D. 1910, and that they knew him up to the time of his death; they and each of them swear and depose that on the 22nd,
29 day of March, A. D. 1910, the testator, said T. Scott Burbank, deceased, was over the age of twenty one years, that he was of sound and disposing mind and memory; that said T. Scott Burbank, deceased, made and executed the said 22nd day of March, A. D. 1910 his last will and testament; and that they witnessed the same at the request of the said testator, T. Scott Burbank, and subscribed their names thereto as attesting witnesses at the request of said T. Scott Burbank and in his presence and in the presence of each other; that said T. Scott Burbank subscribed his name to said last will and testament in their presence. All done on the 22nd day of March, A. D., 1910; that they recognized the instrument offered for probate in this cause as the last will and testament of T. Scott Burbank as and to be the last will and testament of said T. Scott Burbank; and they depose and swear that said instrument offered for probate in this cause is the instrument executed in their presence by said T. Scott Burbank on the 22nd, day of March, 1910, as his last will and testament. They further depose and swear that at the time said T. Scott Burbank executed said last will and testament and at the time of his death, he resided in the city of Temple, County of Bell in the State of Texas, which place was his home and residence; that prior to the time of executing said will, he had become a citizen of Texas, and remained such up to the time of his death, having made the City of Temple in the County of Bell in said State of Texas, his home, moving thereto all his personal effects; that said T. Scott Burbank is dead, that he died on or about the 10th, day of May, A. D. 1910; that he died in the City of Temple, County of Bell, in the State of Texas, which was his home; that he left an estate consisting of personal property situated and located in the County of Bell in the State of Texas (and other property located in another State). They further swear that said T. Scott Burbank, so far as they know never revoked or annuled said will, and that the same is, so far as they know, the last will and testament of T. Scott
30 Burbank.

And the said W. S. Rowland and A. J. Jarrell, further testify and swear, that they know Mary Springer Burbank, the minor mentioned in said will; that she is the daughter of the deceased, T. Scott Burbank, and that at the time of the execution of the said will, and at the time of the death of said father, T. Scott Burbank, she resided in the County of Bell and the State of Texas, and now resides in the County of Bell, State of Texas; and that she was then, and now is at school in said County of Bell and State of Texas.

W. S. ROWLAND.
A. J. JARRELL.

Sworn to and subscribed before me by W. S. Rowland and A. J. Jarrell, the above named witnesses in open court at a regular term

of said court on this 14th, day of June, 1910, as witness my hand and seal of said court the day and year last above written.

[SEAL.] HUGH HARRIS,
Clerk of the County Court of Bell County, Texas.
By C. K. WHITE, *Deputy.*

Filed in open court this 14th day of June, 1910. Hugh Harris, County Clerk, Bell County, Texas, by C. K. White, Deputy.

Order Probating Will.

In Re Estate of T. SCOTT BURBANK, Deceased.

No. 783.

In the County Court of Bell County, Texas, Sitting in Matters of Probate.

On this the 14th day of June, 1910, came on to be heard the applications of J. M. Woodson and Anna Burbank Woodson, to probate the last will and testament of T. Scott Burbank, deceased for
31 letters testamentary, and it appearing to the court that said application was made and filed herein on the 12th, day of May, 1910, and is in due form, and that said will was filed in this court at the same time, and that notice of such application was issued on the said 12th day of May, 1910, and served and executed same day by posting the same in the manner and for the full time and in all things required by law. And testimony having been taken and heard in connection with said application as required by law, and the court having fully considered and understood the same, it appears therefrom to the court and the court finds.

(1.) That said T. Scott Burbank, deceased, the testator, who executed said will, is dead; that he died on the 10th day of May, 1910.

(2.) That four years have not elapsed since his decease prior to the said application.

(3.) That said T. Scott Burbank at the time of the execution of the said will and at the time of his death, resided in the County of Bell, and State of Texas, and that his home was in the County of Bell, State of Texas, and that he had made his permanent domicile in said County of Bell and State of Texas, and that he was at the time of his death, and at the time of the execution of said will, a citizen of the State of Texas; and that he left an estate situated and located in the County of Bell and State of Texas, and that this Court has jurisdiction of his said estate.

(4.) That the instrument offered herein as the last will and Testament of said T. Scott Burbank, being the instrument dated the 22nd day of March, A. D., 1910, signed T. Scott Burbank, and to which W. S. Rowland and A. J. Jarrell are attesting witnesses, same being filed in this Court on May 12th, 1910, and purporting to be the last Will and Testament of said T. Scott Burbank, is the last

will and testament of said T. Scott Burbank, and that the same has been proven as prescribed by law, and that the same has been
32 established and shown to have been executed in the manner, form and with all the solemnities, required by law to constitute a valid last will and testament.

(5.) That by the terms of said will, J. M. Woodson and Anna Burbank Woodson, are named and appointed as Executor and Executrix respectively, and that by the terms of said will, said J. M. Woodson as Executor and Anna Burbank Woodson as Executrix, are the persons to whom letters are to be granted and they are named in said will. And by the terms of said will that are made independent executor and executrix, without bond.

(6.) That said J. M. Woodson named in said will as executor, and said Anna Burbank Woodson named in said will as Executrix, are not, nor or either of them, disqualified by law from being appointed or acting as such executor or executrix, or from receiving letters as such but are in all things qualified.

Wherefore, it is ordered, adjudged and decreed by the Court that said instrument offered as the last will and testament of said T. Scott Burbank as aforesaid, deceased, is the last will and testament of said T. Scott Burbank, deceased; that the same was executed under all the forms and solemnities required by the laws of the State of Texas to constitute a valid last will and testament; that said testator, T. Scott Burbank, was over the age of twenty-one years at the time that he executed the same, and was of sound and in disposing mind and memory, and that at the time that he executed the same, he resided in the County of Bell and State of Texas, which was the place of his domicile, and that he was a citizen of the State of Texas, at the time that he executed said will and at the time of his death; that he is now dead and that he left an estate in said Bell County in the State of Texas, and that this Court has jurisdiction of said estate; and that said J. M. Woodson and Anna Burbank Woodson named in said will respectively as executor and executrix are in no
33 manner, nor are either of them, disqualified to act and be appointed, as such executor and executrix, but on the contrary are in all things qualified.

Wherefore it is further ordered, adjudged and decreed by the Court that said instrument offered as the last will and testament of said T. Scott Burbank, is the last will and testament of said T. Scott Burbank, and that the same be, and is hereby admitted to probate and record as the last will and testament of T. Scott Burbank, deceased; that said J. M. Woodson appointed by said will as the executor and Anna Burbank Woodson, appointed by said will as executrix, be, and are hereby recognized and also appointed, as such executor and such executrix; and it further appearing to the Court that by the terms of said will no bond or security shall be had or required of either of them, and that no proceedings in the probate courts of Texas, or any of the Courts of the State, shall be had in the administration of said estate, further than to probate said will and return an inventory and appraisement of said estate; it is ordered that no bond or security be had or required of either

of them as such Executor or Executrix, and that they have all the powers and authorities granted and conferred upon them by the terms and effects of said will; and that upon the taking of the oath required by law, the Clerk of this Court shall issue to them and each of them letters testamentary.

It is further ordered that Chas. M. Campbell, J. L. Carlisle, and P. W. Carroll, are appointed appraisers to appraise said estate.

It is further ordered that said executor and executrix will return into this court an inventory and appraisement of said estate within sixty days.

And it further appearing to the court that by the terms
34 of said will, said Anna Burbank Woodson, is appointed guardian of the person of Mary Springer Burbank, a minor; and it further appearing to the Court from evidence heard by the court, that said Mary Springer Burbank is a minor under the age of fourteen years; that she is a citizen of the State of Texas, that her home and domicile is in the County of Bell and State of Texas, and was at the time of the execution of said will and at the time of the death of said T. Scott Burbank, and that at the time of the execution of said will, her mother was dead.

It is therefore further ordered, adjudged and decreed that said Anna Burbank Woodson, be and is hereby recognized and appointed as the Guardian of the person of said Mary Springer Burbank, a minor, and her bond as such guardian of the person of said minor, is fixed at the sum of five hundred ($500.00) dollars, and upon execution of said Bond and taking the oath required by law, the Clerk of this Court will issue to her, letters as such guardian of the person of said minor, Mary Springer Burbank,

It is further ordered that the Clerk of this Court, shall duly enter of record in the Probate Minutes of this Court, said application, will, citation, notice and return, this order and all other and further orders and proceedings, had or to be had in this cause.

Oath.

In the County Court of Bell County, Texas, Sitting in Matters of Probate.

No. 783.

In re Estate of T. Scott Burbank, Deceased.

The State of Texas,
County of Bell:

We, J. M. Woodson, Executor, and Anna Burbank Wood-
35 son, Executrix, of the last will and testament of T. Scott Burbank, deceased, do each solemnly swear that the writing which has been offered in this cause in this court for probate is the last will and testament of T. Scott Burbank, so far as we know or believe, and that we will well and truly perform all the duties of

the Executor and Executrix of said last will and testament of said T. Scott Burbank, deceased.

J. M. WOODSON.
ANNA BURBANK WOODSON.

Sworn to and subscribed before me by J. M. Woodson and Anna Burbank Woodson, this 15th day of June, 1910.

[SEAL.] LEONARD CARLISLE,
Notary Public, Bell County, Texas.

Filed June 15th, 1910—Hugh Harris, Clerk County Court, Bell County, Texas, by C. K. White, Deputy.

Oath and Bond of Guardian.

THE STATE OF TEXAS,
County of Bell:

Know all men by these presents, That we, Anna Burbank Woodson as principal (joined herein proforma by her husband, J. M. Woodson) and the other subscribers hereto as sureties, are held and firmly bound unto the County Judge of the County of Bell and his successors in office in the sum of Five hundred ($500.00) Dollars, conditioned that the above bound Anna Burbank Woodson, who has been appointed guardian of the person of Mary Springer
36 Burbank, a minor, shall well and truly perform all of the powers required of her under said appointment.

Given under our hands this 15th day of June, 1910.

ANNA BURBANK WOODSON.
J. M. WOODSON, *Pro Forma.*
CHAS. M. CAMPBELL.
D. G. WILSON.

I, Anna Burbank Woodson, do solemnly swear that I will truly and faithfully perform all of the duties of Guardian of the person of Mary Springs Burbank, a Minor.

ANNA BURBANK WOODSON.

Sworn to and subscribed before me, by Anna Burbank Woodson, this 15th day of June, 1910.

[SEAL.] LEONARD CARLISLE,
Notary Public, Bell County, Texas.

Filed June 15th, 1910—Hugh Harris, Clerk, County Court, Bell County, Texas, by C. K. White, Deputy.

Order Approving Oaths and Bond and Directing Letters to Issue.

In the County Court of Bell County, Texas, Sitting in Matters of Probate.

No. 783.

In re Estate of T. Scott Burbank, Deceased.

On this the 15th day of June, 1910, came Anna Burbank Woodson and presented her bond in the sum of Five hundred
37 ($500.00) dollars as guardian of the person of the minor, Mary Springer Burbank, which bond appearing to be in due form and being executed by herself as principal (joined by her husband pro forma) and by two good and solvent sureties, and conditioned as the law requires, said Bond is approved and the Clerk is ordered to enter and record same, and it appearing that she has subscribed the oath required by statute as the Guardian of the person of said minor, and it also appearing that J. M. Woodson, Executor and Anna Burbank Woodson, executrix of the last will and testament of said T. Scott Burbank have subscribed and filed herein their oaths as such as required by law, it is ordered by the Court that same be filed and recorded and the Clerk of this Court is ordered and directed to issue to them letters testamentary as such Executor and such executrix and to also issue to said Anna Burbank Woodson, letters of the guardianship of the person of said minor, Mary Springer Burbank.

The Clerk will also enter this order of record.

Letters Testamentary.

The State of Texas,
County of Bell:

In County Court, Bell County, Texas, June Term, A. D. 1910.

I, Hugh Harris, Clerk of the County Court of Bell County, Texas, do hereby certify that on the 14th day of June, A. D. 1910, J. M. Woodson and Anna Burbank Woodson were duly granted by said Court Letters Testamentary of the Estate of T. Scott Burbank, deceased, and that they qualify as such executor and executrix, respectively on the 15th day of June, A. D., 1910 as the
38 law requires.

Witness my hand and seal of office, at Belton, Texas, this 16th day of June, A. D., 1910.

[LEGAL SEAL.]

HUGH HARRIS,
Clerk County Court, Bell County, Texas.

Letters of Guardianship.

THE STATE OF TEXAS,
County of Bell:

In County Court, Bell County, Texas, June Terms, A. D. 1910.

I, Hugh Harris, Clerk of the County Court of Bell County, Texas, do hereby certify that on the 14th day of June, A. D. 1910, Anna Burbank Woodson was duly appointed by said court Guardian of the person of Mary Springer Burbank, and that she qualified as such on the 15th day of June, A. D. 1910, as the law requires.

Given under my hand and seal of office at Belton Texas, this sixteenth day of June, A. D. 1910.

[LEGAL SEAL.] HUGH HARRIS,
Clerk County Court, Bell County, Texas.

39 *Certificate.*

THE STATE OF TEXAS,
County of Bell:

I, Hugh Harris, Clerk of the County Court of Bell County, Texas, same being a court of Record, and having a seal, do certify the foregoing 19 pages contain and constitute and are a true and correct copy of the Application to Probate the last Will and Testament of T. Scott Burbank, deceased, the Will offered for Probate, Citation, Notice and return of Sheriff thereon, the written evidence taken in the hearing of said application, the order and judgment of the court admitting said will to probate and record, and appointing executor and executrix and guardian of the person of the minor as therein shown, the oath of said executor and executrix, and the Bond and Oath of said Guardian of the person of said Minor, the action of the Court thereon, letters testamentary to J. M. Woodson and Anna Burbank Woodson and letters of Guardianship of the person of Mary Springer Burbank to Anna Burbank Woodson, and all orders had and made in said cause, and that the same contains all the proceedings had and done in said cause, and are duly entered of record in the minutes and records of said Court.

Attest: Hugh Harris, Clerk of the Court of Bell County, Texas.

Given under my hand and seal of office at Belton, Texas, this 15th day of June, A. D. 1910.

(Sg.)
[SEAL.] HUGH HARRIS,
Clerk of County Court, Bell County, Texas.

40 THE STATE OF TEXAS,
County of Bell:

I, W. S. Shipp, County Judge of Bell County in the State of Texas, being Judge of the County Court of said County, same being a Court of Record, and having a seal, do certify that said Hugh

Harris is the Clerk of the County Court, of Bell County, Texas, and that the foregoing certificate attested and made by him is in due form and is signed and attested by the genuine signature of said Hugh Harris.

To certify all of which, witness my official signature with the seal of said court attached at Belton, Texas, this the 15th, day of June, A. D., 1910.

(Sg.) W. S. SHIPP,
County Judge of Bell County, Texas.

THE STATE OF TEXAS,
County of Bell:

I, Hugh Harris, Clerk of the County Court of Bell County Texas, do hereby certify that the foregoing certificate signed by W. S. Shipp, Judge of the County Court of Bell County, Texas, is subscribed by his genuine signature, and that said W. S. Shipp, is County Judge of said Bell County, being the Judge of said Court.

Attest: Hugh Harris, Clerk of the County Court, Bell County, Texas.

Given under my hand and seal of said court at office in Belton, Texas, this 15th day of June, 1910.

(Sg.) HUGH HARRIS,
Clerk of the County Court of Bell County, Texas.

41 Division C, Civil District Court.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Notes of Evidence, Taken in Open Court, on Wednesday, June 22nd, 1910, Before the Hon. E. K. Skinner, Judge, by A. E. Toliveira, Stenographer ad hoc.

Present:

For Petitioner: Charles S. Rice.
For Defendants: Henry P. Dart, Senior.

By Mr. RICE: Mrs. Margaret Josephine Ernst having presented a so-called answer and opposition to the application of James M. Woodson and his wife, to be recognized respectively as executor and executrix herein, and for registry of the last will of T. Scott Burbank, and the right of the petitioners to be so recognized as executor and executrix, being founded upon said will, and the proceedings had, and the judgment recognizing them as such, now object to the filing of this petition by Mrs. Ernst on the ground that it involves issues in no wise connected with the relief sought for by the petitioning executors. That the right of said petitioners to be recognized as such executors, to have a copy of said will registered, and to administer the estate of the deceased in the State of Louisiana, is founded,

not upon said will but on a judgment of a sister State which is entitled to full credit and faith in the State of Louisiana, as if rendered therein, and is not subject to collateral attack. That the duty of the Court in the premises is to recognize the executors appointed under the will, recognized as such, and qualified as such, under the law of the sister State, upon their production, as they have herein, of a certified copy of those proceedings, showing fully the fully the action of the Court in the State of Texas and their appointment and qualification as executors.

42

That no issue is made which can be heard in this proceeding by the answer filed by Mrs. Ernst, and therefore I move, if your Honor please that said answer be stricken from the record so far as this proceeding is concerned.

By the COURT: I have already appointed Mrs. Ernst as dative dutrix; how can I set that appointment aside?

By Mr. RICE: Her appointment stands as tutrix until one appears from the State of Texas and supersedes her. The question now is whether or not your Honor will regard or disregard the judgment of the Court of Texas as presented to you in due form, and which the Constitution of the United States provides shall be received here in full faith and credit as if rendered by the Courts of this State.

NOTE.—Argument by Mr. Rice.

By Mr. DART: I have filed this appearance in answer to an ex parte application, notice being an oral one from my friend, given to me day before yesterday and yesterday, having made up the issue or joined issue upon his application, I ask for time in which to produce documentary evidence on the facts which I have raised expecting to prove by oral testimony that the Estate of T. Scott Burbank lies solely in the State of Louisiana; secondly, that he was born, raised and has lived in the State of Louisiana all his life, and. thirdly that as recently as a week or two before his death he was still holding an office of the State of Louisiana as Executor of an Estate.

Fourthly, that he never was a resident of the State of Texas or domiciled there or a citizen of the same, but on the contrary from the time of his entry into the State of Texas, until the time of his death, he had not been there over four months, his being there was an accident on account of his state of health, and that he never was a resident of the State of Texas.

43

I now state to your Honor that I need time to get evidence from other States as well as to gather the oral testimony here. I am not making this application for delay, but merely to get the evidence in term time or out of term time.

NOTE.—Argument by Mr. Dart. Matter submitted to the Court.

Endorsed: 93752. Civil District Ct. Succession of T. Scott Burbank. Note of Evidence June 22nd/10 pr Mrs. Anna Woodson Ex etc. Filed November 5th, 1910 (Sig.) Joe Garidel, D'y Clerk.

Appearance and Answer of Josephine Ernst, Legal Tutrix, and Application of Woodson et al.

Filed June 22nd, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

On Petition of Anna Burbank Woodson et al.

To the Honorable the Judges of the Civil District Court in and for the Parish of Orleans:

44 Now comes Mrs. Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank, and for answer and objection to the application herein made by Anna Burbank Woodson, wife of James M. Woodson, and by James M. Woodson, in the petition by them this day presented, says:

That she denies, all and singular, the facts and allegations in the said petition set forth, except as hereinafter admitted;

For further answer and objection, appearer says that T. Scott Burbank, at the time of his death, was a resident of the City of New Orleans and State of Louisiana and a Citizen of the latter State and was not a resident of the State of Texas nor a citizen thereof nor had he ever been domiciliated therein;

For further answer and objection, respondent says that the alleged will made in Texas is void, inasmuch as the testator, at the time he made the same, was mentally incompetent to make said will; that he was suffering from an illness and desease of the brain which was in its critical and acute stage and the said will was not his true act nor did he understand the same;

For further answer and objection, respondent says that the said will, in form, is not such as to convey the decedent's estate and should not be admitted to probate herein, being void for defect in form;

For further answer and objection, respondent says that the decedent's estate is made up, among other things, of real property of large value situated in the City of New Orleans and in the State of Louisiana and said will cannot, in any event, affect the said real estate;

Wherefore, appearer and respondent prays that the alleged
45 last will and testament herein submitted by the said applicants may be rejected and refused probate and may be held to be null and void and of no effect and that the relief prayed for by the said applicants be denied and rejected, at their costs, and appearer and respondent prays for such other and further orders, judgments and decrees as the case may require and for all general and equitable relief.

(Sg.) DART, KERNAN & DART,
Attorneys.

Judgment.

Rendered June 23rd, 1910. Signed June 29th, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

In this case submitted to the Court for adjudication for the reasons assigned this day;

It is ordered that the last will and testament of the deceased presented for probate be filed and that no further action be had herein until further hearing;

Judgment read and rendered in open Court June 23rd, 1910.

Judgment read and signed in open Court June 29th, 1910.

(Sg.) E. K. SKINNER, *Judge.*

46 *Petition of Mrs. Josephine Ernst, Legal Tutrix, to Set Aside Will.*

Filed June 27th, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

To the Honorable the Judges of the Civil District Court in and for the Parish of Orleans:

The petition of Josephine Ernst, Legal Tutrix of the minor Mary Springer Burbank, and a resident of the City of New Orleans, respectfully shows:

That an instrument has been presented herein, by James M. Woodson and Anna M. Burbank Woodson, purporting to be the last will and testament of the late T. Scott Burbank, late a resident of the City of New Orleans, State of Louisiana, and seeking to have said alleged last will and testament registered and executed;

Petitioner shows that said alleged will purports to constitute the said James M. Woodson and Anna M. Burbank Woodson, Executor and Executrix of the said alleged will; that it furthermore purports to give and bequeath the testator's estate to the said James M. Woodson Anna M. Burbank Woodson and Memie E. Burbank De Silva and Nellie G. Burbank Dodge, subject however, to certain provisions in favor of the said testator's minor child and sole heir at law, the said Mary Springer Burbank.

Petitioner shows that said instrument purporting to be the last will

and testament of the said T. Scott Burbank, deceased, is not in truth and in fact his last will and testament and was not made by him understandingly and at a time when he was mentally com-
47 petent to make the same; that he had been suffering from an illness and disease of the brain which was in its critical and acute stage, and shortly subsequent to the making of said alleged will, he committed suicide; that as a result of the illness and disease aforesaid he was incompetent to make the said alleged will here presented or to understand the same if made by others and presented to him for signature; that further more at the time he made said alleged will said T. Scott Burbank was a citizen of the State of Louisiana and a resident of the City of New Orleand and was domiciled in said City of New Orleans and never had any other residence or dimicile;

Petitioner further represents that the estate of said T. Scott Burbank lies in and is situate in the State of Louisiana and in the City of New Orleans;

Petitioner further represents that the said will is null, void and in operative for as much as it creates a prohibited substitution and a fidei commissa and is obnoxious to the laws of Louisiana in other respects, as will appear from a mere reading of the instrument;

Petitioner shows that the persons hereinabove named and who claims to be the executor and the Executrix under said alleged will, and who claims furthermore the rights and inheritances therein attempted to be conveyed to them, are all in the City of New Orleans; that the pretended last will and testament works a great injustice to the said minor, Mary Springer Burbank, who is, under the law of Louisiana, the sole heir of her said deceased father, said T. Scott Burbank, and is entitled to take his estate free from any of the clauses and conditions attempted to be imposed by said alleged will;

48 Wherefore, petitioner prays that James M. Woodson and Anna M. Burbank Woodson, individually and in their pretended capacities of Executor and Executrix of the said pretended will of said T. Scott Burbank may be cited; that Memie E. Burbank, wife of Joseph De Silva, and Joseph De Silva, her husband, may also be cited and that she may be authorized to stand in judgment herein; that Nellie G. Burbank, wife of William R. Dodge, and William R. Dodge, her husband, may be cited, and that she may be authorized to stand in judgment herein, and, after due proceedings had there be judgment decreeing the said pretended last will and testament of said T. Scott Burbank, now on file in the records of this case, which said will purports to be executed on the 22nd day of March 1910, in the County of Bell, State of Texas, to be null, void, inoperative and of no force and effect; and that the said minor Mary Springer Burbank, be recognized as the sole heir at law of her deceased father, said T. Scott Burbank; and as such inheriting purely and simply and free from any and all claims, rights or obligations of any kind in favor of the defendants herein; and petitioner prays for all general and equitable relief.

(Sg.) DART, KERNAN & DART,
Attorneys.

Petition of Mrs. Josephine Ernst, Legal Tutrix, For a Commission, Attachment of Witnesses and Etc.

Filed June 27th, 1910.

Division "C", Civil District Court.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

To the Honorable the Judges of the Civil District Court in
49 and for the Parish of Orleans:

The petition of Josephine Ernst, Legal Tutrix of the minor, Mary Springer Burbank, and a resident of the City of New Orleans, respectfully shows:

That James M. Woodson and Anna M. Burbank, his wife; Memie E. Burbank, wife of Joseph De Silva, and Joseph De Silva, her husband, who are, respectively, the proponents of the alleged last will and testament of T. Scott Burbank and who are also defendants in the actions instituted by petitioner, are in the City of New Orleans, and petitioner fears that they will depart from the State before she has the opportunity to cross examine them herein; that she desires to take the depositions of said witnesses on cross examination, as is permitted to her by the laws of this State and that furthermore she is entitled to an attachment to hold said witnesses until such depositions may be taken;

Wherefore, petitioner prays that a commission do issue to Jeff C. Wenck, Notary Public, to take the testimony on cross-examination of James M. Woodson and Anna M. Burbank, his wife; Memie E. Burbank, wife of Joseph De Silva, and Joseph De Silva, her husband, and the same to return to this court, said testimony to be taken at 1:30 o'clock this Monday, 27th, day of June, 1910, and at such further times as may be necessary under the exigencies and circumstances of the occasion; petitioner further prays that subpoena may issue to each of said witnesses, directing them to duly appear before the said Notary Public, there and then to give their testimony, and that attachments may issue against the persons of said witnesses to hold the same to obey the order of this court in the premises; and petitioner prays for such other and further
50 orders as the case requires and for all general and equitable relief.

(Sg.) DART, KERNAN & DART,
Attorneys.

Affidavit.

Division "C", Civil District Court.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Before me, the undersigned authority, personally came and appeared, Henry P. Dart, who, being by me first duly sworn, deposes and says: That he is a member of the law firm of Dart, Kernan & Dart, Attorneys for Josephine Ernst, Legal Tutrix, of the minor Mary Springer Burbank; that said tutrix is temporarily absent from this Parish; that he is authorized to make this affidavit; and that all and singular, the facts and allegations in the foregoing petition contained are true and correct, to the best of defendant's knowledge and information and belief.

(Sg.) HENRY P. DART.

Sworn to and subscribed before me this 27th, day of June, 1910.

(Sg.) JEFF C. WENCK,
[SEAL.] *Not. Pub.*

51 *Order.*

Division "C", Civil District Court.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Considering the allegations of the foregoing petition:

It is ordered that a commission issue to Jeff C. Wenck, Notary Public, to take the testimony on cross examination, of the witnesses, James M. Woodson and Anna M. Burbank, his wife; Memie E. Burbank, wife of Joseph De Silva and Joseph De Silva, her husband, and that said testimony be taken this Monday, 27th day of June, 1910, at 1:30 o'clock P. M., at the office of said Notary Public; that subpoenas issue from the Clerk's office of this Court to the said witnesses and that attachments also issue to them, to safeguard their appearance before the said Notary Public, for the purpose of giving their said testimony, the whole as herein prayed and according to law.

New Orleans, June 27, 1910.

(Sg.) E. K. SKINNER, *Judge.*

Sheriff's Return to Foregoing Petition.

Filed June 27, 1910.

Received Monday June 27, 1910, and on the same day, month and year I served a copy of the petition and order to take
52 testimony and cross examination on Jefferson C. Wenck, Notary Public, in person.
Sheriff's fees $1.00.
Returned same day.
(Sg.) ERNEST A. LUCAS.

Petition for a Writ of Habeas Corpus.

Filed June 27, 1910.

Civil District Court, Division "C".

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

To the Honorable the Judges of the Civil District Court in and for the Parish of Orleans:

The petition of the State of Louisiana, on the relation of Joseph Ernst, respectfully shows:

That relator is the duly appointed and confirmed Legal Tutrix of the minor, Mary Springer Burbank, and that letters have issued to her as such in the matter of the Succession of T. Scott Burbank, No. 93752 of the docket of the Civil District Court in and for the Parish, Division "C", as will appear from a certified copy of said letters, hereunto annexed as part of this petition.

Relator shows that the body of said minor, Mary Springer Burbank is in the possession, custody and control of James M. Woodson and Anna M. Burbank, his wife, who are within the jurisdiction of this Honorable Court; that they have no right to the possession, custody or control of said minor and are detaining
53 her against her legal rights and said minor should be restored and delivered to the possession, custody and control of your relator, who is both her grand mother and her Legal Tutrix;

Wherefore, relator prays that a writ of habeas corpus may issue, commanding and directing the said James M. Woodson and Anna M. Burbank, his wife, to have and produce in open Court at a day and hour to be named by your Honor the body and person of the said minor, Mary Springer Burbank and there and then to answer this petition and to show cause, if they can, why said minor should not be restored and delivered to your relator and why they should not release their possession, custody and control of said minor

without delay; and relator prays for such other and further orders as the case requires and for all general and equitable relief.

(Sg.) DART, KERNAN & DART,
Attorneys.

Affidavit.

Division —, Civil District Court.

No. —.

STATE OF LOUISIANA ex Rel. JOSEPH ERNST
VS.
JAMES M. WOODSON et al.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Before me, the undersigned authority, personally came and appeared, Henry P. Dart, who, being by me first duly sworn deposes and says: That he is a member of the law firm of Dart, Kernan & Dart, attorneys for Josephine Ernst, legal Tutrix of the minor, Mary Springer Burbank; that said Tutrix is temporarily absent from this State, that he is authorized to make this affidavit; and, that, all and singular, the facts and allegations in the foregoing petition contained are true and correct, to the best of deponent knowledge, information and belief.

54

(Sg.) HENRY P. DART.

Sworn to and subscribed before me this 27th, day of June, 1910.

(Sg.) JEFF C. WENCK,
Not. Pub.
[SEAL.]

Order.

Let a writ of habeas corpus issue herein as prayed for and let the Sheriff of this Parish produce the body and person of the minor Mary Springer Burbank if she be found, and let an order issue to James N. Woodson and Anna M. Burbank, his wife, to have and produce the body of said minor, Mary Springer Burbank before this Court on the 28th day of June, 1910, at 11 o'clock A. M. without further notice, and to abide further orders and decisions of the court in the premises.

New Orleans June 27, 1910.

(Sg.) E. K. SKINNER, *Judge.*

55 *Letters (Copy) of Tutorship of Mrs. Josephine Ernst, Legal Tutrix, Attached to the Petition for a Writ of Habeas Corpus.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division "C".

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

This shall certify to all whom it may concern, That on the 17th, day of June, in the year of our Lord one thousand nine hundred and ten and the one hundred and thirty-fourth of the Independence of the United States of America, an application was made to the Honorable E. K. Skinner, Judge of the Civil District Court for the Parish of Orleans, Division "C" by Mrs. Josephine Ernst praying that she might be appointed legal tutrix of the minor, Mary Springer Burbank.

Now, know ye, that Mrs. Josephine Ernst, has been and she is hereby appointed legal tutrix of the said minor, Mary Springer Burbank and that she has fulfilled all the requisites of law.

Witness our hand and seal of the said Civil District Court this 21st, day of June, in the year of our Lord one thousand nine hundred and ten and in the one hundred and thirty-third of the Independence of the United States.

(Sg.) E. K. SKINNER, *Judge.*
P. A. DUCOING, *Dy. Clk.*

A true copy.
(Sg.) P. A. DUCOING, *Dy. Clk.*

56 *Exception and Return of James N. Woodson and Wife to Writ of Habeas Corpus.*

Filed June 28, 1910.

Civil District Court, Parish of Orleans, Division "C."

No. 93752.

STATE OF LA. ex Rel. JOSEPHINE ERNST
vs.
JAMES M. WOODSON et al.

And now comes James M. Woodson and his wife, Anna M. Woodson, of Temple, Texas, made respondents and for return to the application for writ of Habeas Corpus, say:

1st. The proceedings is a separate and distinct proceeding and

cannot be legally grafted on or filed in the suit of the Succession of T. Scott Burbank; that there is a misjoinder of actions.

2nd. The petition of the relator is not sworn to as required by law and the order to produce the body of the minor, Anna S. Burbank, into court improvidently issued.

Wherefore respondents pray that these exceptions be maintained and relator's suit dismissed with costs.

And for all general relief.

(Sg.) A. E. BILLINGS,
RICE & MONTGOMERY,
Of Counsel.

In case the foregoing exceptions are overruled, then reserving all rights under the same, respondents for further return say that the court is wholly without jurisdiction in the premises, the said minor not being a resident of the State of Louisiana, and not in said State or within the jurisdiction, and has not been in this jurisdiction for more than two years last past—said minor now
57 being in the State of Texas and more than 500 miles from the City and Parish of Orleans where above entitled proceedings has been filed.

And for further answer respondents aver that your respondents aver that your Respondent, Anna M. Burbank, wife of James M. Woodson, is the sole testamentary guardian of the person of said minor and duly confirmed as such in the County Court, County of Bell, State of Texas, a court of competent jurisdiction; and that she has qualified and is such lawful guardian, and that letters as such have issued to her from said Court, all as more fully shown from the duly exemplified copy of proceedings had in said court on file herein and now specially made part of this return; that she has sole custody as such guardian of said minor and her said custody is lawful and relator is without lawful right or interest in the premises.

Wherefore, respondents pray that the petition of the Relator be dismissed with costs and for all general relief.

(Sg.) A. E. BILLINGS,
RICE & MONTGOMERY,
Of Counsel.

Personally appeared, James M. Woodson and Anna M. Burbank, his wife, and being by me duly sworn did severally depose and say that all and singular the matters stated in foregoing return are true.

(Sg.) JAMES M. WOODSON,
ANNA M. WOODSON.

Subscribed and sworn to before me this 28th day of June ,1910.

(Sg.) P. A. DUCOING, *Dy. Clk.*

58 Division "C", Civil Dist. Court, Parish of Orleans.

No. 98752.

SUCCESSION OF T. SCOTT BURBANK.

On Application for Writ of Habeas Corpus.

Testimony and Notes of Evidence, Taken in Open Court Before the Hon. E. K. Skinner, Judge Presiding on the Trial, on Tuesday, June 28th 1910, by A. E. Oliveira, Stenographer ad hoc.

Present:

For the Relator: Mrs. Josephine Ernst, Henry P. Dart, Sr., of Dart, Kernan & Dart.
For Respondents: Chas. S. Rice and A. E. Billings.

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59 By Mr. RICE: Counsel for respondents, James M. Woodson and wife offer in evidence their return, and ask that the same be filed, and in connection with the return I offer in evidence the affidavit of the respondents attached thereto.

We also offer in evidence the exemplified copy of the record in the County Court of Bell County, State of Texas, rendered in the matter of the application to probate will, and for letters and each any every part thereof, to-wit: The petition, the will of T. Scott Burbank, notice of application for probate of said will, sheriff's return thereon, endorsements thereon, the proof of will, the petition thereto attached, the certificate showing filing of the same, the order to probate the will, the oath of the executors, the bonds of the executors, and oath thereto attached, the order approving said oaths and bond, and directing letters to issue, the letters testamentory issued therein, the letters of guardianship issued therein appointing Mrs. Burbank Woodson, one of the respondents herein as guardian of the person of the minor Mary Springer Burbank, the certificate of the Clerk of Court, the certificate of the Judge and the certificate of the Clerk in exemplification of said record, the same being already on file in

this suit, under date of June 22nd, 1910, to-wit, in the Succession of T. Scott Burbank, No. 93752 of the docket of this Court, under said date of June 22nd, 1910.

Doctor JAMES M. WOODSON who being first duly sworn by the Court on behalf of Respondents, did testify as follows:

Direct examination by Mr. RICE:

Q. You are the James M. Woodson, mentioned in this application for a writ of habeas corpus?
A. Yes, sir, I am.
Q. And your wife is Anna M. Woodson?
60 A. Yes sir.
Q. Co-respondent?
A. Yes sir.
Q. Where is the minor, Mary Springer Burbank?
A. In Temple, Texas.
Q. In what place?
A. In my home.
Q. How far is that from New Orleans?
A. About five hundred miles.
Q. More or less?
A. Well, probably a little more. I don't know exactly; about five hundred miles.
Q. How long has she been there?
A. Since the 10th of February, 1910.
Q. Where was she prior to that?
A. At Rock Island, Illinois.
Q. Of your own knowledge, Doctor, how long had she been at Rock Island, Illinois; did you ever see her there?
A. No sir; I have not seen her there; I haven't visited there since she has been there.
Q. She came to Temple, Texas from where?
A. From Rock Island, Illinois.
Q. Who came with her?
A. Her father, T. Scott Burbank.
Q. T. Scott Burbank, her father?
A. Yes sir.
Q. Has she been within this jurisdiction since coming to Temple, Texas, in February last?
A. She has not.
Q. Is she here now?
A. She is not.

Cross-examination by Mr. DART:

Q. How old is the child?
A. She is past thirteen.
Q. Until the 10th of February, 1910, what part did you
61 take in in her rearing, maintenance or education, if any, doctor?
A. None at all.

Q. When she was at Rock Island, Illinois, she was at school *school*, was she not?
A. Yes sir.
Q. When she was brought to Texas she was put in School, was she not?
A. She was, and she was at school in Doctor De Silva's home, in Rock Island.
Q. She was in Rock Island for the purpose of education?
A. No sir.
Q. Had not her father taken her North to educate her?
A. No sir.
Q. What was she sent there for?
A. To live.
Q. The child was sent there, abandoned by her father?
A. No sir. She was taken there.
Q. Then she was taken there?
A. Yes sir.
Q. Was he not suffering from disease of the brain when he went from New Orleans?
A. I didn't consider that he was.
Q. Had he not an operation performed on part of his skull?
A. Yes sir.
Q. Is it not true that part of his skull was removed in that operation?
A. Yes sir; he had an operation performed on the frontal sinus.
Q. He had two operations performed on him for injuries to his skull or head?
A. Yes sir.
Q. You are a physician?
A. I am.
Q. Tell me what operation was performed upon his skull?
62 A. The technical name is on the ethmoid cell and frontal sinus.
Q. Reduced to the English of the layman, let us have it?
A. The frontal sinus are the cavities just under the brows and the ethmoid cell extending on the latter ring to the nose, high up.
Q. What was the operation in question, the physical doing, doctor? How the operation was performed physically by the surgeon who handled him?
A. A cut was made from—I didn't see the operation. I can only explain from what I saw of the scar.
Q. Very well, doctor; let's have it.
A. An incision was made near the bridge of the nose and extending out over the eyebrow and opening the nose and eradicating the cells along the face and eradicating the sinus.
Q. On both sides?
A. He only had the left side operated on.
Q. They removed something from the skull?
A. No; there is a layer between the skull and brain, and these cells were situated between the skull and brain.

Q. And they took them out?
A. They removed them.
Q. They left the brain open?
A. No sir; it was protected by a layer or bone behind it.
Q. It had removed one of the protections of the brain from the interior of the skull?
A. No sir; the interior of the skull was not injured at all.
Q. Did this operation touch the brain?
A. No sir.
Q. What other operation was performed and what was it for?
A. The first operation was performed in New Orleans by Doctor Matas.
Q. What was that for?
A. It was an operation to the brain.
63 Q. On what side of the head, doctor?
A. Left side.
Q. How was it performed by Doctor Matas?
A. A flap was made by cutting down to the bone, pulling back that flap and going through the bone tissue and lifting back the bone tissue and reaching the brain, and then opening the abscess.
Q. Removing the abcess?
A. No sir, draining it.
Q. That was all performed by Doctor Matas of this City?
A. Yes, sir.
Q. Did it leave the patient cured?
A. He had immediate improvement after the operation. At the time he went on the table his left side was paralyzed, and he was unable to speak, and as soon as he got off the table, after the effects of the anasthetic had passed off, he was able to use his right arm and leg and talk.
Q. What happened next in his history, doctor?
A. From day to day he was making the usual recovery.
Q. Did he continue in the charge of Doctor Matas?
A. Yes, he did.
Q. Did he quit Doctor Matas?
A. No sir, not until discharged from the hospital.
Q. Then he did what, doctor?
A. He went to Rock Island, Illinois.
Q. Didn't he go to Rock Island for further treatment?
A. He went to Chicago, for an operation; I am not clear whether he went to Rock Island.
Q. He went to Chicago for further operation?
A. He went to Chicago, as I understand it, after he went to Rock Island.
Q. And for a further operation is my question, doctor?
A. Yes sir.
64 Q. Was that operation performed?
A. Yes sir.
Q. For what?
A. On these cells which I have just indicated.
Q. That was to relieve the brain?
A. No sir.

Q. Then what? You are a physician?
A. That was to relieve a very ugly catarrh.
Q. He left New Orleans in search of health, didn't he, or do you know anything about it personally?
A. I don't know anything about it personally.
Q. His daughter had been previously sent to school at Rock Island, Illinois, previous to this operation having been performed upon him?
A. That is not clear to me; I do not know.
Q. You do not remember?
A. No sir.
Q. Do you know then whether or not it is a fact that he took his daughter with him when he went away sick that time, the last time when he left here, do you remember, doctor?
A. The last time he went?
Q. Yes sir?
A. That last time he left New Orleans his daughter was in Rock Island.
Q. You know that to be a fact?
A. Yes sir.
Q. There is no mistake about that?
A. No sir.
Q. Now, then, doctor, had she ever been in Texas until he brought her there on this trip South?
A. No sir.
Q. How long after he arrived in Temple, Texas, was it that he made his will?
A. He arrived on the 10th of February, and made his will
65 on the 22nd of March.

By Mr. RICE: I think this matter is limited.
By Mr. DART: Why don't you object if you think so?

By Mr. DART:

Q. Do you know what lawyers he consulted in the making of the will?
A. I do.
Q. Who were they, please?
A. W. S. Banks, of Temple, Texas.
Q. Who is W. S. Banks, your lawyer?
A. No sir, he is not my lawyer.
Q. You recommended him.
A. Yes, sir.
Q. You introduced Mr. Burbank to him?
A. Yes; by Mr. Burbank's request.
Q. I have no doubt. Did Mr. Banks make the will, that you know of?
A. Mr. Burbank consulted Mr. Banks about the will. My understanding is that Mr. Burbank dictated the will to Mr. Banks or a stenographer.
Q. Were you not present?
A. No, sir.

Q. Were you not in the room?

A. No, sir.

Q. Had not you been in consultation with them as to what there was to be done?

A. Yes, I advised.

Q. With Mr. Burbank and Mr. Banks, that is right?

A. Yes; I have been in consultation; I knew the will was to be drawn.

Q. With whom were you in consultation; Mr. Rice wants to know; with Mr. Banks?

A. Yes, sir.

Q. Were you present when Mr. Burbank had his con-
66 sultation with Mr. Banks?

A. No, sir; I was not.

Q. How long previously had you departed from Mr. Banks? I mean from his presence?

A. I had not seen him that day.

Q. You told Mr. Banks what was desired?

A. No, sir; I told Mr. Banks that Mr. Burbank wanted to make a will.

Q. Did you tell him what Mr. Burbank wanted?

A. Mr. Burbank asked me to refer him to a lawyer, and Mr. Banks is a man of reputation in our section of the country as a probate and civil lawyer. I told him that if I was going to have any business done I would see Mr. Banks, and Mr. Burbank asked me to introduce him to Mr. Banks, which I did, and a few days afterwards Mr. Banks was passing my residence, and Mr. Burbank called Mr. Banks and made the appointment.

Q. Had Mr. Burbank told you what he wanted to do with his property and effects?

A. Yes, he did, in a general way.

Q. Did you tell that to Mr. Banks in a general way?

A. No, sir.

Q. Then you knew Mr. Burbank's intention was to make your wife a legatee under certain contingencies?

A. I didn't know it.

Q. Didn't Mr. Burbank tell you that he intended to leave his property so your wife and his other sister could get it?

A. We are going now from the time Mr. Banks saw Mr. Burbank at my residence?

Q. I don't know the details; I want to know if you didn't know that he intended to leave his property so your wife and his other sister could get it?

A. I did know at the time when the will was drawn, but I didn't know at the time that Mr. Burbank called Mr. Banks.

67 Q. Who suggested that the Estate should be left in trust as it is here?

By Mr. RICE: I think the time has come to object to this testimony as thoroughly irrelevant. I object to further testimony relative to any other matters than those issues raised by the pleadings as wholly

irrelevant, and the only inquiry that can be made is under the pleadings in relatrix' petition.

By Mr. DART: The evidence, I suppose, was originally offered to show jurisdiction of another State and another Court. My evidence is clearly to show how the man came to be there, and I am probing along that line, and I am going into the facts how he came to have possession of the child and under what circumstances.

By the COURT: Let the objection go to the effect. The Court will limit this evidence to the question of guardianship or tutorship of the minor.

By Mr. RICE: To which ruling of the Court counsel for respondents except, reserve a bill, and have this note made in lieu of a formal bill of exceptions.

Q. Who suggested that the estate should be left in trust as it is here?

By Mr. RICE: What has that to do with this application for a a writ of habeas corpus?

By Mr. DART: I will withdraw the question for the time being inasmuch as the gentleman now interposes an objection.

By Mr. DART:

Q. Doctor, is W. S. Banks your personal lawyer?

A. He never transacted any business for me.

68 Q. Are you aware that his name is signed to your petition to open the estate of Mr. Burbank?

A. Yes; I am aware of that.

Q. So, he never transacted any personal business for you?

A. Never before this time.

Q. Did you ever have any to have a lawyer?

A. Yes, I have.

Q. Who is your lawyer?

A. W. S. Lemley has done business for me.

Q. You never have done any business through Mr. Banks?

A. No sir.

Q. Where is the child actually now, doctor?

A. That is a question, I cannot answer.

Q. Is she not at the school where her father placed her?

A. I cannot answer; she was attending school during the week and returned at my house Friday evening, and returned to school on Monday morning.

Q. She was at a boarding school?

A. Yes, sir.

Q. Her father placed her there when he came to Texas?

A. Her father and my wife.

Q. And she returned to your home at the end of the week?

A. She was there sometimes during the middle of the week.

Q. How far is that college from your home?

A. Eight miles.

Q. And the child returned to your house after the death of her father and after the vacation of the school set in, is that a fact?

A. Yes, sir.

Q. And if the school was in session now she would be attending?
A. Yes, sir.
Q. It was after the school session that she came to your
69 home?
A. Yes, sir.
Q. Kindly tell me what estate this minor has in Temple, Texas?
A. The inventory of that estate has not been filed.
Q. I understand you are dispensed from making an inventory by the will?
A. By no means, nor sir; we have to make an inventory.
Q. In any event the inventory has not been filed?
A. No, sir.
Q. What is the physical estate over there?
A. There are some household goods.
Q. Worth about how much?
A. About three hundred dollars.
Q. What else?
A. A bank box.
Q. What is in it?
A. Bonds.
Q. How much?
A. I don't know the exact number of bonds, but I think the estate is valued at about thirty thousand dollars.
Q. Everything over there?
A. Yes, sir.
Q. What did he bring with him?
A. His child and a trunk.
Q. And his money.
A. No, sir.
Q. He had deposited his money with you?
A. No, sir.
Q. So he sent for his property after he got there?
A. Yes, sir.
Q. How long after?
A. I think he made a request about probably two or three weeks after he was there.
Q. Have you any personal knowledge on it at all, sir?
A. About his sending for it?
Q. Yes?
A. I have.
70 Q. What did Mr. Burbank do at Temple, Texas, after he arrived there?
A. You mean what his occupation was?
Q. Yes, sir?
A. Why, he had none.
Q. Let's be frank with each other doctor; his occupation was that of an invalid?
A. He was considered somewhat of an invalid; he was not well.
Q. He only left your house for the necessary exercise?
A. No, he went out for pleasure and exercise and recreation.
Q. He was an invalid at the time of his death?

A. He was a semi-invalid.
Q. And his death was by his own hand?
A. Yes, sir.
Q. And by shooting?
A. Yes, sir.
Q. He blew his head off?
A. Yes, sir.
Q. How many weeks or months after he arrived in Texas did he die?
A. Three months.
Q. And in that three months he made his will and spent the time as an invalid and killed himself; is that right?
A. Yes; that part is right.
Q. And that is all of the time that he ever lived in Texas, is it not?
A. I think to my knowledge it is.
Q. I assume, of course, that he was buried in Texas?
A. He was not.
Q. He was not buried at his domicile?
A. No, sir.
Q. Where was he buried?
A. In New York State, at his father's burial ground—his father and mother and all of the family are buried there.
Q. May I ask you one other question? When and how did you get the advice that Mrs. Ernst, the grandmother was trying to
71 be made tutrix of this child in New Orleans, when and how?
A. I am just thinking when; I got it through Judge Rice.
Q. What was it? Can you tell me. Was it not information coming from Judge Rice that I, Dart, on behalf of the grandmother, had inquired whether or not T. Scott Burbank had left a will, or what was to be done in his estate—do you remember that?
A. All I remember about it is that I got the information through Mr. Rice.
Q. To the effect that I—
A. To the effect that you made application for the grandmother.
Q. Anterior to that I ask you did you not get information from Mr. Rice that I, Dart, had inquired of him, shortly after the death of Mr. Burbank, whether or not Mr. Burbank had left a will; do you remember that?
By Mr. RICE: I admit that is a fact.
By Mr. DART: Will you go further, Mr. Rice, and admit that you did not advise me that they had probated that will while I was waiting to learn from you whether or not there was a will?
By Mr. RICE: My understanding is that I told you that the will had not been probated in Texas, but would be.
By Mr. DART: I mean, asking you about the 12th, 13th or 14th, right after the death, and you told me you were inquiring and would advise me as to whether or not there was a will?
A. I didn't have the information.
By Mr. DART: Doctor, when did you learn that Mrs. Ernst was applying to be appointed tutrix of this minor in New Orleans?

By Mr. RICE: I'll swear that question, if you want.

By Mr. DART: I have no objections.

72 By Mr. RICE: I informed him when she made the application.

By Mr. DART: Immediately by mail?

By Mr. RICE: Yes; either that day or several days afterwards.

By Mr. DART:

Q. Doctor, what social organization is there in Temple, Texas, what Club? Is there anything of that kind?

A. There is an Elks' Lodge and a Masonic Lodge.

Q. Did Mr. Burbank join any of them at the time he was in Texas?

A. No, sir, none that I know of.

Q. Did he vote while he was in Texas?

A. He was not there long enough to vote.

Redirect examination by Mr. RICE:

Q. How long have you known Scott Burbank, doctor?

A. I have known him since 1892.

Q. Where did he reside at that time?

A. I think his residence was on his father's plantation.

Q. Where was that?

A. On Avon Plantation, Assumption Parish.

Q. Do you know when and why he left that plantation?

A. Yes sir. I know about when he left the plantation; he left the plantation I think it was in February, 1908.

Q. In the meantime, from 1892 until then, he had been living on the plantation?

A. Yes, sir.

Q. He came to New Orleans then?

A. Yes, sir.

Q. Do you know what for?

A. Yes; he came in search of health.

Q. And this treatment that you spoke of followed?

A. Yes, sir.

Q. Do you know what time he first went to Rock Island,

73 Illinois, I mean after he came to the City of New Orleans in 1908?

A. I think it was about June, 1908; I think it was probably in June, 1908, that he went to Rock Island.

Q. Do you know where he was at the time of his father's death?

A. He was here in New Orleans.

Q. You were here at the time were you not?

A. I was here a day or two afterwards.

Q. Doctor De Silva from Rock Island, Illinois, was here at the time of his death?

A. A few days after his death.

Q. E. W. Burbank, the father, died very suddenly?

A. Yes, sir.

Q. Instantaneously?
A. Yes, sir.
Q. From the time Mr. Scott Burbank came to Texas, in February, 1910, in whose house did he live?
A. He lived in my house.
Q. Did he bring any furniture with him?
A. He brought some bedding with him; I mean by bedding a few blankets.
Q. Do you know whether or not he had any furniture at Rock Island?
A. Yes; what do you understand by furniture? Woolen furniture or bed room furniture? The furniture that Mr. Burbank had, do you mean?
Q. Yes, sir?
A. Yes, pictures, I mean wall pictures, paintings and bedding, pillows, linnen, comforts, blankets, and some crockery ware; several crates of crockery ware; china and things that he brought from the plantation where he formerly occupied a house, and had carried from the plantation to Rock Island.
74 Q. I suppose you were in daily communication with him?
A. I was.
Q. He ate at your table?
A. Yes, he did.
Q. He slept in your house?
A. Yes, sir.
Q. Did he express himself during that time with reference to where he proposed to live thereafter?
A. Yes, sir.
Q. How did he express himself? What did he say?
A. He expressed himself as living in Temple, and he spoke of buying property there.
Q. Buying property for what purpose?
A. To erect a home, a cottage to live in.
Q. What was the conversation as to where he proposed to live? What was the substance of it?
A. Shortly after he came to our house he made application to make that his home; the weather had been so cold in the North that he could not live there and he was advised by his physician to live South. He asked daily if he could live with us, and we put him off and told him to wait until he was better acquainted with conditions.
Q. Did or did not his condition improve from the time he got to Texas until the time of his death?
A. It did.
Q. I am speaking of his physical condition?
A. Yes, sir.
Q. Tell us what was the state of his mental condition during the time—I mean if there was any indication that he was weak in mind or insane?
A. I saw no indication whatever that he was insane or otherwise unbalanced in mind; he read his paper every morning, ate his meals and slept well.

75 Q. His will is date- the 22nd of March?
A. Yes, sir.
Q. Tell us whether there were any indications about that time——

By Mr. DART: Objected to as leading.

By Mr. RICE:

Q. Tell us what was his mental condition on or about the 22nd of March, when this will was made?
A. His mind was clear.
Q. Was there anything to indicate that he did not know what he was doing?
A. No, sir.
Q. Tell us whether he spoke of the will after it was made?
A. He did.
Q. How frequently before he died?
A. He said several times that he thought the will was all right; it met with his purpose.
Q. Did he speak of its contents?
A. Yes; he told me that the will showed his affection for his child and that was the thing that he wanted expressed in it, and he wanted his sisters to enjoy what he had left in the event his child should pass away or die without issue. He also told me that he didn't want Mrs. Ernst to have any part of his effects.
Q. How was his recollection or memory?
A. Very good, as far as I could see. He would tell me about his childhood days and his trips to California and Mexico; he used to make trips out there years ago. He spoke frequently of them and discussed matters on theplantation, how the plantation was operated.

76 Q. Can you tell whether he had or made many acquaintances in Texas?
A. He made comparatively few acquaintances in Texas, as many there I presume as a man of Mr. Burbank's position would make. I think his social life was more pronounced in Texas than anywhere else.
Q. What you mean by that?
A. I mean he was more social there than he was in New Orleans. He usually had a chat after breakfast and a chat after supper; he would read the papers and tell me about the news they contained. He took the New Orleans papers and was a regular subscriber to them. He read them after receiving the mail, and he read our local paper in the morning.
Q. Do you know whether he left any property or belongings of any sort in Rock Island that he didn't send for?
A. No, sir, he sent for his property in Rock Island.
Q. And it came to Texas?
A. Yes, sir.
Q. Do you know whether he left any property in New Orleans except his interest in the succession of his father?

A. He had nothing here except his interest in his father's succession.

Q. Do you know whether he left any relatives or friends in New Orleans?

A. He had relatives here; he has a sister living in New Orleans.

Q. How many sister- had he?

A. Three sisters.

Q. Where did the other two live?

A. My wife in Temple, Texas, and Mrs. De Silva, in Rock Island, Illinois.

Q. Had he any business in New Orleans of any sort or kind?

A. Why, he was the executor of the Estate of his father?

77 Do you call that business?

Q. No sir, I do not.

A. No sir, none other.

Q. He was a widower?

A. He was.

Q. And had only this one child?

A. One child.

Q. He left here in the latter part of March or 1st of April, 1909, about the time that you did?

A. Yes sir.

Q. You had been here for some time?

A. Yes, sir.

Q. He left for what place?

A. He left for Rock Island, Illinois.

Q. With Doctor and Mrs. De Silva?

A. I understand so.

Q. And you went——

A. I preceded them a few days; I went to Texas.

By Mr. DART:

Q. Are you a physician?

A. I am.

Q. Have you made a specialty of the study of the mind and mental diseases?

A. No sir.

Q. May I ask you what you were doing for your brother in law? Were you treating him in any way and what was the course of treatment?

A. Why, I was giving him occasionally a wash for catarrh.

Q. Nothing else?

A. No, sir; nothing else.

Q. Were you trying to treat him for his melancholia?

A. I was giving him no medicine.

Q. What treatment were you giving him for it?

A. I'm not willing to acknowledge he was suffering with

78 melancholia.

Q. What was he suffering with?

A. Mr. Burbank had no pronounced disease that I know of except this catarrhal trouble.

Q. Is that all?

A. Yes, sir.
Q. He was feeble?
A. He was not strong.
Q. He was enfeebled by disease was he not?
A. His feeble condition was due more to lack of exercise; Mr. Burbank was in the hospital a number of months, and after that time he never took much exercise.
Q. Let us have his life in your house; he stayed around all day?
A. No; he took walks and came down town.
Q. How far from your house?
A. Five blocks.
Q. How often?
A. Once a day when the weather was favorable.
Q. And when the weather was not favorable?
A. He would not come out.
Q. How long would he stay out?
A. Probably an hour or an hour and a half.
Q. And then go back home?
A. Yes, sir.
Q. And lie down?
A. No, he laid down in the afternoon.
Q. He recognized himself as being an invalid and treated himself as an invalid?
A. I know he was not a strong man.
Q. Did he speak of himself as sick constantly?
A. Yes, sir.
Q. Did you ever give it any thought why the man committed suicide?
79 A. Yes, sir.
Q. And why?
A. I think the immediate cause of Mr. Burbank's suicide was disappointment. He received a letter that a settlement of the estate had been postponed, which he had been expecting would be settled. We received a letter from Rice that Mrs. Dodge and her lawyers had secured a continuance, and it would probably go to the next term of Court, and he made the expression that that means next year; it means October, he said.
Q. And——
A. And during that day he was melancholic and the next morning he committed suicide.
Q. While you were in the house?
A. No; I was in Dallas.
Q. Was the madam home?
A. Yes; Mrs. Woodson was home.
Q. At the time?
A. Yes, sir.
Q. What particular disappointment or pang was it that he suffered in not having the case settled?
A. The poignant anxiety in not receiving his estate; he was anxious to get his affairs settled up.

Q. He had the comforts of life around him, he was living in your house?
A. Yes, sir.
Q. He was treated as a patient?
A. Yes; my wife and my sister and all treated him as well as we could. Mr. Burbank became melancholic and disappointed because the estate was not settled up at the time.
Q. For how long did he suffer that way?
A. On Monday the news was received and the next day, Tuesday the suicide was committed.
80 By Mr. RICE: On the 10th of May?
A. Yes sir, Tuesday, the 10th of May.

By Mr. DART:

Q. Is it your desire to impress us that he suffered nothing from the head or face?
A. He was not suffering from the head; he had catarrhal trouble giving rise to an offensive odor that troubled him some.
Q. Does that affect the nerve?
A. Yes, sir.
Q. Is it not your experience, as a physician, that chronic catarrh, after being treated surgically and not getting it well is a thing that racks the nerves and physical body more than anything else?
A. No, sir.
Q. Have you treated many cases of catarrh?
A. I have.
Q. Has it any effect upon a man's nerves or body?
A. No, sir.
Q. Does it give him fever or irritate him?
A. No, sir.
Q. Did you ever hear of hay fever? Isn't that a kinsman to catarrhal trouble?
A. Not the kind Mr. Burbank had.
Q. It caused the decaying of the bones that you have been describing?
A. Yes, sir.
Q. And the cells that you have been describing?
A. Yes, sir.
Q. Then the interior of his skull was decaying and sluffing away through his nose?
A. It was not inside of his skull; it was on the outside of
81 the skull; I can explain that there are two layers of the skull.
Q. It was the outside layer that was affected by the catarrh?
A. And these cells are intervening here between the inside and outside layers of the skull.
Q. And it was that that was decaying and offensive?
A. Yes, sir.
Q. And that was what you were tr-ing to cure?
A. Yes; that is what he was operated upon for.
Q. Did the operation change the appearance of his nose and face?
A. No, sir.

Q. Wasn't he marked and scarred?
A. Only a slight dent.
Q. Didn't the operation on his skull change the contour of his skull?
A. Very much.
Q. I heard it stated that it left a hole in that side of his skull large enough to put a goose egg and hide it?
A. You could not hide a goose egg in the hole.
Q. Could you put a goose egg in the hole?
A. No, sir, it was not that deep.
Q. How deep was it?
A. When he was laying down that opening was not probably more than a quarter of an inch, and when he was up for several hours the blood pressure was changed and the atmospheric pressure would press the scalp in, and it was probably an inch and a half.
Q. And the movement of his brain could be seen?
A. No, sir; you could not see the pulsation.
Q. Did that injury to his skull leave him open to the effects of the atmospheric changes in the weather?
82 A. I never observed.
Q. Did you ever have any opportunity to observe?
A. No, it didn't affect him in any way.
Q. The bone was removed?
A. Yes, and the blood was there to keep the head warm.
Q. Everything that normally protects the brain on the outside had been removed?
A. Yes; immediately on that scar.
Q. Why did they have to remove the bone out of the skull?
A. It was removed to meet the abcess.
Q. Could it not have been trepanned if there was nothing the matter with the skull bone?
A. Looking at it as a doctor, it would be hard to define; a doctor would fear that he might not find the exact location of the ab-cess; doctor Matas was quite sure that Mr. Burbank had a brain ab-cess, but the exact locality was not perfectly plain; so he preferred to lift up this bone flap in order to find the exact location of the ab-cess.
Q. Do you know who Mr. Burbank was in consultation with in Chicago? You say that he went to Chicago for treatment?
A. I only know by what I have heard; I was not there.
Q. What did you hear?
A. I heard that he consulted a doctor Andrews.
Q. A specialist on the nose?
A. I understand he is a surgeon; I do not think he makes the nose a specialty.
Q. Then, as I understand you, Mr. Burbank would make occasional references to the fact that he liked Temple, Texas?
A. Oh, frequent reference.
Q. He liked it?
A. Yes, sir.
Q. And contemplated staying there?

A. Yes, sir.
Q. He never got beyond the point of living in your house?
A. No; never.
Q. How long were you a brother in law to Mr. Burbank before he died; how many years?
A. From 1892.
Q. What were Mr. Burbank's habits about taking holidays from the time you married into the family?
A. I knew very little about Mr. Burbank, that is, about holiday occasions.
Q. You knew very little about him at all, didn't you?
A. I made occasional visits to New Orleans; sometimes I would see him and sometimes I would not.
Q. There was very little acquaintance between you and him up to the time of the succession?
A. No intimate acquaintance.
Q. Don't you know that he had the habit in latter years of taking a vacation either at his sister's place, Mrs. De Silva, in Rock Island, or his father and mother's place in New York?
A. My understanding is that he did not have that habit.
Q. Which member of the family had the residence in New York, the father or mother?
A. Neither of them.
Q. He did not have the habit of taking a holiday from the time you married into the family until 1908, until the time of his illness?
A. That is right.
Q. I understood you to say to Mr. Rice that the sickness ran from 1908?
A. Yes, he took sick in 1908.
Q. Then the man had his first attack in 1908?

A. Mr. Dart, Mr. Burbank had been suffering some
84 months with this catarrhal trouble, and even when Mrs. Burbank died.

Q. When was that?
A. I think it was in December, 1907—is that correct? I came down on that occasion and he spoke to me about this condition of his head.
Q. What did he say to you.
A. He was having a discharge through his nose.
Q. He was sick?
A. No; he was attending to the plantation duties at that time.
Q. I always thought that Mrs. Burbank died in 1908?
A. I think she died in December, 1907.
Q. Then he was suffering with this catarrhal trouble in 1907?
A. Yes, sir.
Q. But he was attending to his duties on the plantation?
A. Yes, sir.
Q. Now, when did you next see him to talk to him?
A. The next time I saw him I think was in February, 1908.
Q. After Mrs. Burbank's death?
A. Yes; after Mrs. Burbank's death.

Q. What was his condition then?

A. He was affected from December, 1907, up to the time I saw him in February, 1908.

Q. What was the matter with him when you saw him the last time?

A. When I saw him the last time he had this brain ab-cess.

Q. That was in the month of February, 1908?

A. Yes, sir.

Q. When did you next see him after February, 1908?

A. I remained home several days, probably a week or ten days and I saw him daily.

85 Q. You have described to me the symptoms of that brain ab-cess?

A. Yes, sir.

Q. He was physically unable to get out?

A. At the time before he was operated on before the brain ab-cess he was paralyzed in his right side, and speechless; but afterwards he was able to speak.

Q. A paralysis of the speech indicates that there is a paralysis of the nerves, does it not?

A. To the speech center—no sir.

Q. It is an affection of the brain?

A. Yes, sir.

Q. How long had that lasted, doctor?

A. I think it began about three days before I saw him and continued to progress up to the time of the operation.

Q. Can you give us, from the start to the finish, how long—from February, 1908, to what time?

A. I cannot remember the date in February. In February 1908, Mr. Burbank was taken sick to his bed at his father's home—the doctor was called in and pronounced this a brain ab-cess.

Q. That was Doctor Matas?

A. Yes; Doctor Matas made a diagnosis of the brain ab-cess and advised an operation; the operation was postponed for further development for two or three days. Doctor De Silva and myself were sent for and when we arrived we urged the operation and agreed with Doctor Matas in his diagnosis, and when he was operated on it was found that Doctor Matas' diagnosis was correct; that he had a brain ab-cess. At the time when I first saw him, which I think was on a Friday evening, he had very little motion in his right arm or his right leg, and his speech was such that some words he could not call, and that condition continued to progress until the operation. When he went on the table he could not say anything.

86 Q. You cannot place the date of that operation?

A. I cannot give the exact date; it was between the 10th and 15th.

Q. How long was he an invalid directly under this operation?

A. I don't know how long he remained in the Infirmary; he was there about a week while I was there.

Q. He was there quite a while?

A. Yes; for some time.

Q. After he got out of the Infirmary, what did he do, to your knowledge?
A. After he left the Infirmary he went to Rock Island.
Q. What Infirmary was he in?
A. The Touro Infirmary.
Q. Still under Doctor Matas?
A. Yes, sir.

By Mr. RICE:

Q. What are your specialties, doctor?
A. Eye, ear, nose and throat.
Q. So that this catarrhal trouble with which Mr. Burbank was suffering was within your special skill?
A. It was.
Q. Can you tell us whether that catarrhal condition affected his mind in any way?
A. No, sir, it did not.

(Recess.)

By Mr. DART:

Q. I want to ask you one or two more questions,—Doctor you mentioned that Mr. Zurbank said something about Mrs. Ernst having nothing to do with this inheritance; is that it?
A. Yes, sir.
Q. You do not know Mrs. Ernst herself, do you?
87 A. No sir, not personally.
Q. That is all that he said?
A. No, sir; it is not.
Q. Do you deny that Mrs. Ernst raised this baby that is in your hands now?
A. No, sir.
Q. And that she raised the child until she was seven years old?
A. No, sir; I knew that the child spent some time with her grandmother, I don't know how much.
Q. Did he give you any reason for his objections to Mrs. Ernst?
A. There was some feeling existing between them; I did not inquire, but he gave me one reason for it.
Q. He showed feeling against her?
A. The feeling was that Mrs. Ernst was not capable of transacting the girl's business.
Q. That was all?
A. He mentioned further more that on a former occasion there was a child under her care and that the final settlement was not satisfactory.
Q. These were two reasons that he gave you, is that right?
A. Yes, sir.
Q. Did he go into any details in regard to Tootsie Buhler's affairs?
A. He went into some details about it.
Q. Did he tell you that Mr. Burbank, Senior, had carried on a litigation against this girl, Tootsie, as they call her, Buhler? Did he tell you that?

A. He didn't tell me that.

By Mr. RICE: I think there is a limit somewhere; in our return there are two points made and there are only two points in
88 the case; if this minor is in the State of Texas your Honor is forbidden by the Constitution of the State of Louisiana from listening to this matter. How does the testimony that is sought to be elicited touch a question of this sort unless your Honor is going to set aside the judgment of the Court of the State of Texas, which is here, and assume jurisdiction over the minor who is in the State of Texas, over which that Court is exercising jurisdiction? Unless your Honor is going to do that your Honor is bound to refuse the application no matter what may be concerned. These other questions that may be raised by my friend, unless they can show that this minor is in the jurisdiction of this State, the Constitution of the United States prohibits your Honor to issue a writ of Habeas Corpus for a person out of this jurisdiction. I say that the testimony is of such a nature that is not produceable upon this trial.

By Mr. DART: Does your Honor want me to argue the question about jurisdiction? because my friend is all wrong on it?

By the COURT: My recollection of the law is that if I should make this Habeas Corpus peremptory and order the defendants to turn the minor over to the petitioner, in default I must instruct the Sheriff to take the child and turn it over to petitioner; that is my recollection of the law. And I cannot issue an order that cannot be executed.

By Mr. DART: The Code provides if the people who have custody of the minor do not deliver the child you can send them to prison until they do.

89 By the COURT: I am not expressing a final opinion in this matter. Suppose we go along and hear such evidence as we can and then you gentlemen argue all the objections at the same time, and let the objection go to the effect.

By Mr. RICE: To which ruling of the Court counsel for respondents reserve a bill of exceptions, with the understanding that this objection is made to all testimony, the Court making the same ruling, and counsel reserving a bill of exception thereto.

By Mr. DART:

Q. What I want to get at Doctor is, did Scott Burbank tell you that Mr. Burbank, Senior, your father in law, had a litigation against the Estate of this child, Tootsie Buhler?

A. No, sir; he did not.

By Mr. RICE: Same objection; same ruling; and same bill reserved.

By Mr. DART:

Q. Did he tell you that Felix Ernst, the husband of Mrs. Ernst, the applicant here, he being dead, had resisted the law suit and otherwise saved the minor's estate?

A. No, sir.

Q. In other words, he did not tell you what the underlying cause was of his objection about Tootsie Buhler's affairs?

A. All he said was that when Tootsie Buhler came into possession of her estate she didn't receive the money she should have.

Q. He didn't tell you that he himself tried to destroy her interest by a law suit in this Court in which he was defeated?

A. No, sir; he did not.

By Mr. RICE: The foregoing testimony, and all testimony taken in this matter, heretofore or hereafter, and on the applica-
90 tion of James M. Woodson and his wife to be recognized as executors, under the probate of the will made in Texas, also on the issues made by Mrs. Ernst in the petition filed by her herein, to set aside the will of the deceased, in so far as proper and relevant to either matter, may be used as if taken in this particular matter, saving this, however, the right to ask the Court at the present time to deny the writ of habeas corpus, now applied for, unless the relatrix claims her ability to show as a physical fact that the minor, Mary Springer Burbank, is within the jurisdiction of this Court.

By Mr. DART: On behalf of the petitioner we offer in evidence the entire record in the succession of T. Scott Burbank, No. 93752 of the docket of this Court, particularly the application of Mrs. Josephine Ernst to be appointed legal tutrix, and all of the proceedings had thereunder including the order of appointment and the letters therein issued.

Mrs. JOSEPHINE ERNST, sworn by the Court in her own behalf, testified as follows:

Direct examination by Mr. DART:

Q. Mrs. Ernst, your name is Josephine Ernst?

A. Yes, sir.

Q. You are what relation to the minor Mary Springer Burbank?

A. Grandmother.

Q. The child's mother was your daughter?

91 A. Yes sir.

Q. What was your daughter's name?

A. Ida Christina Ernst Burbank.

Q. When was Ida married to T. Scott Burbank?

A. They were married in 1896 on the 1st of February.

Q. When was the baby born?

A. The baby was born on the 2nd of December, 1896.

Q. When did Ida, your daughter, die?

A. Ida died on the 12th of December, 1899.

Q. The baby was how old?

A. Three years and ten days old.

Q. What part had you taken in the raising of the child up to that time?

A. She stopped at my house off and on.

Q. Was the baby born in your house?

A. Yes, sir.

Q. How long did the mother and child stay in your house after the birth of the baby?

By Mr. RICE: I object to the question asked of the witness or to any other testimony to be adduced upon the trial of this application for a writ of habeas corpus, except such testimony that goes or tends to prove that the minor mentioned in this proceeding is at present in the jurisdiction of this Court.

By the COURT: The objection goes to the effect.

By Mr. RICE: To which ruling of the Court counsel for respondents excepts, reserves a bill, has this note made in lieu of a formal bill of exceptions, and also has it noted on the record that objection is made to all testimony on like subject matter, the Court making the same ruling and counsel reserving a bill of exceptions thereto.

A. Five months.

92 By Mr. DART:

Q. After the mother died who took the child and raised her?

A. I did.

Q. Who gave you the child to raise?

A. Mr. Burbank.

Q. The father of the child?

A. Yes, sir.

Q. How long did you keep the child?

A. Three years.

Q. Until the child was how old?

A. Six years old.

Q. Then what happened?

A. She was taken away from me.

Q. By whom?

A. By the grandmother.

Q. Not Scott Burbank?

A. No sir, the grandmother took the child away to Rock Island, Illinois.

Q. The grandmother took the child away from you when it was six years old?

A. Yes, sir.

Q. Have you seen much of the child since?

A. No sir.

Q. Have you corresponded with the child?

A. Very seldom.

Q. Did you write to her regularly?

A. I did. I wrote twice and there was no answers since the father's death.

Q. Anterior to that you used to write to the child?

A. Yes, off and on.

Q. You kept track of her?

A. Yes, I did.

Q. What is the condition of your mind towards this child?

A. Well, Mr. Dart, to tell the truth, if I have the baby I
93 will raise it the same as I did her mother, and as she asked me to do.

Q. What did the father ask you to do?

A. When the mother died he asked me to raise that baby the same as I did her mother and I promised him I would faithfully do so.

Q. Are you able to take care of this child?

A. Yes, sir.

Q. Have you means to raise her yourself without regard to her own estate?

A. Yes, sir.

Q. Mrs. Ernst have you always occupied the position in life that you now hold?

A. Yes, sir.

Q. You have always been accustomed to the comforts of life have you?

A. Yes, sir.

Q. You have a son who is a physician?

A. Yes, I have.

Q. Your dead husband was a merchant in New Orleans?

A. He was.

Q. Is this your only grandchild?

A. No, sir.

Q. You have grandchildren through your son?

A. Six by my son and one by my daughter.

Q. This is the oldest grandchild?

A. Yes, sir.

Q. Your daughter Ida was your oldest child?

A. No, my son, the Doctor, is the oldest.

Q. But the oldest daughter?

A. Yes, sir.

Cross-examination By Mr. RICE:

Q. Where do you reside, Mrs. Ernst?

A. I reside in New Orleans.

94 Q. What number and what street?

A. No. 911 State Street.

Q. How many nights have you slept in New Orleans in the last six months?

By Mr. DART: Objected to as irrelevant on the ground that it is utterly immaterial whether Mrs. Ernst has one or three houses. She has been appointed tutrix here, and if the object is to show she was not living in New Orleans, it is irrelevant, and therefore I submit this is not part of the cross examination.

By Mr. RICE: I think I have the right to press the question to know where the child is going to live if Mrs. Ernst gets possession of it.

By the COURT: Let the objection go to the effect.

By Mr. RICE:

Q. What is your answer?

A. I didn't count them; I can't tell exactly.

Q. Haven't you slept ten nights in Ocean Springs, Mississippi for every night that you slept in New Orleans during that time?

A. No, sir.

Q. How long have you been in New Orleans now?

A. I came into New Orleans this morning.

Q. Where did you come from?

A. Ocean Springs.

Q. How long has it been since you have been in New Orleans before?

A. Two days before.

Q. How long were you here at that time?

A. Two days.

Q. Where did you come from then?

A. Ocean Springs.

Q. How long had it been since you had been in New Or-
95 leans before?

A. Six days.

Q. You say you have a home on State Street?

A. Yes, sir.

Q. Do you keep house there?

A. No; I am stopping with my son.

Q. Have you servants there?

A. No sir, not mine.

Q. What servants have you there?

A. None.

Q. Who lives there?

A. My son.

Q. And he keeps house there?

A. Yes, sir.

Q. When you come over you stay there?

A. Yes, sir.

Q. And during the balance of the time you live in Ocean Springs?

A. Yes, sir.

Q. How long have you been living in Ocean Springs?

A. Back and forth for the last three years.

Q. What proportion of time have you been at Ocean Springs and what proportion of that three years have you been in New Orleans? Have you been here a quarter of the time?

A. Oh yes, more than that.

Q. Where will this child be kept if your keep possession of it, here or at Ocean Springs?

A. I would have to decide that later. If she is to be educated in New Orleans she will have to remain here.

Q. You haven't thought of that question at all where you would keep the child?

A. No sir.

96 Q. Not at all?

A. No, sir.

Q. You intend to leave your home in Ocean Springs in order to take care of the child in New Orleans?

A. Yes, sir.
Q. In other words you would abandon your place in Ocean Springs for the sake of the child here?
A. Yes, sir.
Q. Who owns the furniture in the house on State Street?
A. The Doctor.
Q. What do you own there?
A. My bed room set.
Q. That is all?
A. Yes, sir.
Q. The parlor, the kitchen and dining room, and all of the other bed room suits belong to your son?
A. Yes, sir.
Q. It is known as his house is it not?
A. Yes, sir.
Q. You have a furnished house in Ocean Springs?
A. Yes, sir.
Q. How long have you had a furnished house there?
A. Three years now.
Q. You moved that furniture from New Orleans?
A. Yes, sir.
Q. You moved it over there to reside there, did you not?
A. No, sir; not for me; it was taken for my daughter.
Q. Who keeps house there?
A. My daughter, and I stay with her when I am over in Ocean Springs.
Q. And have been doing so for how long
A. Three years.
97 Q. Now, what portion of those three years have you been in New Orleans?
A. Almost half of it.
Q. Do you mean to say that you have spent more of that three years living in New Orleans than you have in living in Ocean Springs?
A. Almost half of the three years I spent in New Orleans.
Q. What part of the time have you spent in New Orleans?
A. Mostly half of the time of those three years.

By Mr. DART:

Q. Mrs. Ernst you have lived in New Orleans all your life?
A. Yes sir.
Q. And your forefathers before you lived here?
A. Yes sir.
Q. And you family, which is a large one, are living here?
A. Yes, sir.

By Mr. RICE:

Q. I understand, Mrs. Ernst, that Mr. Scott Burbank took this child away and sent it or took it to Rock Island?
A. Yes, sir.
Q. How old was the child at that time?
A. Six years old.

Q. Since then the child has not lived with you?
A. No sir.
Q. You have written to the child, you say?
A. Yes, sir.
Q. Where have you mailed the letters that you wrote to the child?
A. I mailed them to the school she was boarding at.
Q. Yes, but didn't you mail all of them from Ocean Springs?
A. Yes, sir.
Q. You have tried to induce the girl to come to you?
A. No, sir; I never asked her to come to me.
98 Q. You asked her to come to you at Ocean Springs?
A. Oh yes; that I did.
By Mr. DART: Last Summer?
A. No; this Summer.

By Mr. RICE:

Q. Have you ever tried to induce her to come to New Orleans to you?
A. Yes sir.
Q. Have you ever tried to induce her to come to you in Ocean Springs?
A. No, sir, only to spend a little time with me.
Q. At Ocean Springs?
A. Yes, sir.

Doctor JAMES M. WOODSON, (recalled for further cross-examination.)

By Mr. DART:

Q. How did you and Mrs. Woodson get possession of the letters addressed by Mrs. Ernst to the child at the Academy?
A. We received the child's correspndence; the child was under Mrs. Woodson's exclusive control, and she reads her letters and all of the mail that is addressed to the child, she received.
Q. And all of those letters from the grandmother, the child was not allowed to receiv ethem?
not allowed to receive them?
Q. Don't you know that she was not allowed to answer those letters?
A. No sir.
Q. Don't you know that she was not allowed to write to her grandmother?
99 A. No sir; her father did.
Q. But don't you know that since the father's death the letters did not come into the child's possession?
A. I do not.
Q. Don't you know that the letters under seal came into your wife's possession, and is it not a fact that both you and your wife have taken means to prevent the grandmother from reaching the child in any manner, shape or form?

A. We told the child that it was her father's wish that she should not write to the grandmother.
Q. You asked her not to write?
A. The child was t carry out her father's wish, as I understood it.

NOTE.—This matter is continued until the 6th of July, for argument, and in order to relieve Doctor and Mrs. Woodson from remaining in attendance on the Court it is agreed in open Court that Doctor Woodson will return whenever the judgment of the Court becomes executory.

Civil Dist. Court, Parish of Orleans, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Testimony taken by consent this 28th day of June, 1910, at the office of Jefferson Charles Wenck, a Notary Public, in and for the Parish of Orleans, State of Louisiana, in the Cora Building, at New Orleans, La., it being understood — of the witnesses may be used in so far as the same may be or is relevant or admissible in the proceeding for a writ of habeas corpus, on the application of James M. Woodson and his wife to be recognized as executors, to have
100 the will of the deceased, T. Scott Burbank, as admitted to probate in the County Court of the County of Bell, State of Texas, and authorized to act as such, and on the issue made upon the petition of Mrs. Josephine Ernst, Tutrix, to set aside the last will and testament of the decedent T. Scott Burbank. All objections reserved except those as to manner and form.

Doctor JOSEPH DA SILVA who being first duly sworn by Jefferson C. Wenck, Notary Public, did testify as follows:

Direct examination by Mr. RICE on behalf of JAMES M. WOODSON and wife, one or both, in the proceeding mentioned.

Q. Doctor, where do you reside?
A. At Rock Island, Illinois.
Q. You are a physician by profession?
A. I am, sir.
Q. Surgeon also?
A. Yes, sir.
Q. How long have you been a physician and surgeon?
A. Since 1893.
Q. Did you know the late T. Scott Buurbank?
A. Yes, sir.
Q. How long had you known him before he died?
A. I would say sixteen years; probably a little more than sixteen years.
Q. Where?

A. I knew him both in the State of Louisiana as well as in the State of Illinois.

Q. How frequently did you see him in the intervals from the time you first knew him up to the time of his death?

A. Quite often.

Q. In the City of New Orleans or at Rock Island?

101 A. At both places.

Q. What was his business or occupation, and where at the time when you first knew him?

A. He was Manager of the Avon Plantation, located at Donaldsonville, Assumption Parish.

Q. Whose plantation was that?

A. The plantation of his father.

Q. His position was what?

A. Superintendent and Manager.

Q. That was his position, as I understand, when you first knew him?

A. Yes, and during my acquaintance with him.

Q. How long did he continue in that position?

A. Up to the time I saw him in the month of February, 1908, that is my memory.

Q. Then you saw him where?

A. At the home of his father, E. W. Burbank, in New Orleans.

Q. What was his physical condition at that time or was he suffering from any illness?

A. At the time I saw him in February, 1908, he was afflicted with hemipiglia, paralysis of the right side of the body.

Q. What, in the ordinary language, is hemiplagia?

A. I have explained it—the right side of the body including the tongue; paralysis.

Q. Was it at that time confined to the body?

A. Yes sir.

Q. Do you know whether he underwent any treatment for these troubles?

A. Yes sir.

Q. Of which you were cognizant?

A. That I were cognizant of?

Q. Yes?

A. He underwent an operation for the relief of the trouble

102 I have just mentioned.

Q. What was it for?

A. It was an operation for which was supposed to be and afterwards proved to be an abcess of the brain.

Q. Who performed that operation?

A. Doctor Matas.

Q. Were you present?

A. Yes, sir.

Q. When the operation was performed?

A. Yes sir.

Q. Was it successful or unsuccessful?

A. Successful operation.

Q. After that operation where did Scott Burbank reside?

A. He remained in the hospital here in New Orleans; I can't state positively, but I would think until the month of April, and then he went to his home from there, remaining there until the month of June,—his father's home, 1908—then he came to us in the City of Rock Island, Illinois, for a visit.

Q. By "us" you mean yourself and wife?

A. Yes; that is at our home at Rock Island, Illinois, the home of myself and my wife, Mr. and Mrs. Da Silvo.

Q. He remained there how long?

A. He remained with us—I would not state positively, but I think until the month of November, the fore part of November of the same year; then he returned to New Orleans, remaining here until the fore part of April.

By Mr. DA SILVA: 1909.

By the WITNESS: Then he returned with us to the home of Mrs. Da Silva and myself at Rock Island, where he remained until the middle of February—the 10th—I should say 1910, at which time he went to the home of Doctor and Mrs. Woodson at Temple, Texas.

Q. What was his mental condition during the time when he was with you, from June 1908 to November, 1908?

103 A. I considered it normal.

Q. Also from April 1909 to February, 1910?

A. I considered him of normal mind.

Q. What do you say in regard to his mental capacity for making a will and disposing of his property thereby?

A. I would consider him of sound and disposing mind.

Q. Is there any question about it?

A. No question about it whatever in my mind.

Q. Did he show any indication of mental weakness or incapacity to make contracts, to take care of his property and effects or his own person?

A. No sir, none whatever.

Q. Was he any different from other sane men in that respect?

A. No, sir.

Q. Doctor, before or after he left New Orleans, did you hear him express any intention as to where he intended to reside in the future?

A. Yes, sir.

Q. Where and when?

A. Both in the City of New Orleans as well as in the City of Rock Island, Illinois.

Q. What did he say were his declarations or statements in New Orleans?

A. He didn'- want to live in the State of Louisiana.

Q. Did he express any intention with respect to that?

A. Yes, sir.

Q. What?

A. He said he would go to Illinois and make his home there with us, that is, Mrs. Da Silva and myself.

Q. What reason did he give or assign for going to Texas?

A. The reason that actually impeled him to change his residence from Illinois to Texas was due chiefly to the fact that the Winter that he spent with us was the most severe in the records of the weather bureau, and it is said by the record to be the
104 severest weather that we had in thirty-three years. Consequently, he being a Southerner, he suffered extremely from the cold, and being very anxious to escape the cold during the latter part of February and the month of March, I suggested to him that it would be well to go an a visit to his sister in Texas, and if he thought he liked it we thought he had better adopt it as his home, as the Winter was very severe in Illinois. With that suggestion, and because of the severity of the Winter, and because his confinemnets followed with the severity of the Winter, he acted upon our suggestion, and he went to the State of Texas as his home.

Q. Did he make or express any intention in regard to remaining there?

A. He said if he liked Texas and the climate was agreeable and his sister was willing to take care of him that he would make it -is home.

Q. Did he have any furniture or anything of that sort at your home?

A. Yes; he had some household goods at our home.

Q. Where had he brought them from?

A. From New Orleans and the plantation at Donaldsonville.

Q. What became of them?

A. They are in the State of Texas.

Q. Who removed them?

A. He instructed us to send them to Texas.

Q. Did he remove them?

A. No; he sent for them.

Q. They were sent on?

A. Yes sir.

Q. Did he have any other belongings other than those you have mentioned as household goods while he was in Rock Island?

A. Yes, sir.

Q. What?

105 A. He had a bank box.

Q. And its contents?

A. Consisted of bonds.

Q. Those are in Rock Island?

A. Yes, sir.

Q. Where were those brought from?

A. From New Orleans.

Q. At what time?

A. The time when he went to Rock Island.

Q. What became of that bank box and its contents.

A. He wrote to us and asked us to send it to Temple, Texas.

Q. And accordingly?

A. They were sent.

Q. So far as you know they are there yet?

A. Yes; they are there yet.

Q. He had a daughter, Mary Springer Burbank?
A. Yes, sir.
Q. Was she at any time in your household?
A. Yes, sir.
Q. When, first?
A. I think it was the Summer of 1908; that is right, isn't it? (Witness addressing his wife.)

By the WIFE: Mary was with me one Winter for five or six months when she was a child, but I don't just remember the Winter.

By the WITNESS: Then she returned to New Orleans, didn't she Memie? (addressing his wife.)

By the WIFE: At that time, yes, but when Scott came to us on that visit in June, 1908, Mary accompanied him and she remained with us continuously until the middle of February, 1910, when she and her father went went to Texas.

106 By Mr. RICE:

Q. Who brought her to your home?
A. The last time her father, Mr. T. Scott Burbank.
Q. In 1908?
A. Yes, sir.
Q. That was when he brought her?
A. Yes, sir.
Q. Was she there before that?
A. Yes; she was there for four or five months before that.
Q. When was that?
A. In 1907, the Summer before—wasn't it Memie?
By Mrs. DA SILVA: I can't remember the date.
By the WITNESS: Several years before that.

By Mr. RICE:

Q. She went with her father to Texas?
A. Yes, sir.
Q. Have you heard directly from her since she went to Texas?
A. Yes, sir.

Cross-examination by Mr. DART:

Q. How old is the child?
A. I think Mary is about thirteen and a half years of age.
Q. A small or large girl?
A. I would consider Mary a fair averaged size girl for her age.
Q. Intelligent?
A. Yes; I consider her a precocious child.
Q. Well developed?
A. Yes, sir.
Q. When did Scott Burbank die, do you remember?
A. May 10th, 1910.
Q. How long was that after he left your house?
A. He left us in the middle of February, 1910.
107 Q. You know of course, that he died by his own hand?
A. Yes, sir.

Q. It is your idea that when he left New Orleans last, which you place in the month of April, 1909——

A. Yes——

Q. Your idea is that he left with the intention of making a domicile with you in Illinois?

A. Not only his intention but his purpose.

Q. And you feel that this fact is well settled in your own mind?

A. Yes sir, absolutely.

Q. Then he left New Orleans in February 1909 with the purpose and intention of making his domicile in Rock Island, Illinois?

A. Yes sir, absolutely.

Q. And that the vigor of the winter destroyed that intention and he went seeking for a new home; is that right?

A. Yes sir.

Q. Why did he go in April of 1909 to your place? He went with you?

A. Yes, sir.

Q. What was the matter with him when he went?

A. He simply wanted to change his residence; he wanted to leave Louisiana.

Q. No other reason at all?

A. Except to be with his sister.

Q. Any other reason?

A. None that I know of.

Q. Are you positive there was no other reason?

A. Not that I know of.

Q. If he had any other reason he didn't tell you?

A. I think he would have told us.

Q. To illustrate; was he not a sick man when he left here?

A. He was not perhaps in the best of health; I would not
108 say that he was sick man in the sense of having to be confined to bed or needing the personal services of a nurse, but he was not strong.

Q. Is it or is it not true that he came out of the Infirmary and went North in search of health?

A. He came out on my invitation.

Q. What for?

A. Because it was Summer, and the heat in New Orleans was so severe, and as a convalescent patient he came to Illinois.

Q. The two reasons were, first, a change of domicile, and, second, for a change of climate, and in June, 1908, he went in search of health?

A. Yes, sir.

Q. In 1909 he was a perfectly well man, in your opinion?

A. Not rugged and strong; he was not a well man.

Q. Whom did he consult in the West, outside of yourself?

A. He consulted me.

Q. What did you treat him for?

A. Just as a convalescent patient.

Q. What did you give him?

A. I speak of 1908.

Q. I'm talking of 1909?
A. In 1909, when he came there, it was for the purpose of changing his domicile and making his home with his sister; that was the primary purpose of his coming.
Q. But you say he was a well man?
A. Yes; a fairly well man.
Q. Was he following any occupation of any kind?
A. No sir.
Q. Was he an industrious man?
A. As far as I know.
Q. Had he worked all of his previous life?
A. I don't know except during my period of acquaintance.
109 Q. And he was a hard worker?
A. I cannot testify to the character of work.
Q. He had steadily worked?
A. Yes; as far as I know.
Q. After his illness in 1908, he did no further work?
A. No sir, not that I know of.
Q. His mother died in 1907?
A. Yes, sir.
Q. Who supported him and took care of him in 1908?
A. He lived with his father.
Q. Who supported him?
A. I suppose financially he was able to do that himself.
Q. Casting presumptions aside, do you know of any pursuit that he followed through which he supported himself in 1908?
A. I do not.
Q. Are you willing to say that he was supported by his father and not by his labor?
A. I cannot say that, Mr. Dart.
Q. Did he leave any estate except that derived from his father and mother?
A. That I cannot say.
Q. Were you one of the executors?
A. No, sir.
Q. Your wife was?
A. Yes sir.
Q. Do you know from hearsay or otherwise of any estate or property that he left that was not derived from his mother, or father?
A. I'll answer that by saying that I don't know, but it is my opinion that a large part of those bonds were those that he had bought as a result of his own personal earnings and savings.
Q. Anterior to his mother's death?
110 A. Yes sir.
Q. Have you any knowledge of your own as to what occupation he pursued in the years 1909 and 1910, from the time of his father's death down to the time of his own death?
A. He had no occupation.
Q. Is it true or not true that within that time he had two surgical operations performed upon him, during the period from his mother's death to the time of his own death?
A. No sir. Both operations were since his mother's death.

Q. They were serious operations?
A. Yes sir.
Q. Were they of a kind that would expect a man to resume physical work after going through?
A. Exceptions prove the result, and the unexpected is always happening in the treatment of the human body.
Q. In this case it is a fact that whatever may have been his antecedent habits, that this man did not work after he passed through the first operation?
A. He was consulted frequently by his father in regard to the plantation, so that during the time intervening between the date of his operation and operations until the death of his father, I would consider him as serving the plantation because his father frequently consulted him in an advisory way.
Q. But he did not manage the plantation after the operation?
A. He was consulted and my impression is that he was active as a consultant in the management of the plantation.
Q. You know that of your own knowledge?
A. Yes; I know that of my own knowledge.
Q. Why do you give it as an impression if you have the knowledge?
A. I will correct that, Mr. Dart, and say I know that to be a fact.
111 Q. How do you know it?
A. I saw his father and heard him consult him in regard to the plantation.
Q. Where?
A. In Rock Island, and in his office in New Orleans.
Q. In what year?
A. 1908.
Q. You know as a fact that Scott Burbank used to live on the plantation and manage it while on the plantation; isn't that true?
A. Yes, sir.
Q. And after his first operation he withdrew from the plantation and lived in New Orleans in his father and mother's house; is that not true?
A. Yes, sir.
Q. And if he did any kind of labor it was intelligential?
A. Yes; it was partly intelligential.
Q. And it was entirely in New Orleans and not on the plantation?
A. Yes; as far as I know.
Q. After his father's death do you know any occupation that he pursued?
A. No sir, no occupation.
Q. This physical stroke that he received of hemiplagia paralysis of the right side that you speak of, was a rather serious thing was it not, doctor?
A. Your question is not correct, Mr. Dart; pathologically speaking it was a stroke that was the result of an infection arising from trouble in the nose.
Q. How could that affect his brain, doctor?

A. The infection spread upwards and localized itself at this particular point in the brain.

112 Q. What side of the brain?

A. Left.

Q. In your skilled judgment, doctor, where did the disease originate,—ab-cess of the brain?

A. No sir, it originated from infection arising from the nose.

Q. Whereabouts in the brain was the ab-cess?

A. Just generally about the middle part.

Q. And the trouble in the brain was about the middle parts?

A. Yes, sir.

Q. I heard that spoken of as an ab-ces in the brain?

A. Yes, sir.

Q. Was it an ab-cess?

A. Yes sir.

Q. What caused it?

A. It originated from an infection that originated in the nose, in the parts above the nose.

Q. How could that have caused trouble in the brain?

A. By the infection, First, there must have been a poisoned condition brought about there, with the blood vessels or lymphatics, and in some way killed this poison and localized it at this particular point.

Q. And caused an ab-cess?

A. Caused the formation of an ab-cess.

Q. An ab-cess in time?

A. These symptoms of hemiplagia—these are the symptoms of hemiplagia.

Q. Hemiplagia being itself the sym-tom and the result being paralysis?

A. Hemiplagia is paralysis, the paralysis being the symptom and direct result of this brain ab-cess.

Q. And had the treatment not succeeded, it would have been fatal?

A. Yes sir, it would have been fatal.

113 Q. The treatment was the removal of a part of his skull?

A. Yes, sir.

Q. Did you see the operation performed, doctor?

A. Yes; I was present.

Q. Will you describe it, unscientifically, if you can?

A. The legs, arms, and speech centers being involved is indicated by the existing paralysis, and it is but a natural inference that the ab-cess was located within the region of these centers, so the scalp was prepared for the operation, and generally speaking the location of this center showed a portion of the brain laying directly over these centers, which was removed, and the ab-cess located and drained, and there followed almost an instantaneous and continuous improv-ment up to the hour of his death.

Q. Was the wound in the skull made that way healed?

A. It healed in time.

Q. Are you sure of that?

A. Yes, sir.

Q. Did you watch his condition to see?
A. Yes; I was present in the hospital with him for two weeks.
Q. And you say it healed?
A. Yes, sir.
Q. It has been said that there was a wound covered by nothing on the scalp?
A. That was healed.
Q. And the bone was never replaced?
A. That is a different question. I say yes, the wound healed.
Q. It has been said there was a wound left in the scalp big enough to put an egg there?
A. No, sir.
Q. And a cavity an inch and a half deep?
A. That is a different question.
Q. I'm asking you if the the wound healed?
114 A. Yes, sir.
Q. You still say the wound healed?
A. Yes, sir.
Q. What do you understand by the word "wound"?
A. The wound that resulted from the operation.
Q. And then you now swear that it healed?
A. Yes, sir.
Q. I'll tell you that it was testified that the bone was never replaced and that that wound was covered by the scalp; what have you to say about that?
A. I say that the bone was not replaced without the scalp wound healed.
Q. Would that ever have healed?
A. It did heal.
Q. Could the bone have been replaced?
A. The bone could have been replaced and healed.
Q. How?
A. The same way as any bone.
Q. Then he had never reached the period necessary for the wound to heal itself to knit and to fill up?
A. He had passed that period.
Q. Then, why was it doctor, that the bone did not knit?
A. Because they were not replaced.
Q. We come back to my first question,—that up to the time of his death the man carried in his head an open interior covered only by the scalp?
A. No, Mr. Dart; I certainly don't understand you; you have one thought in mind and I have another.
Q. Then I'll illustrate. If I had a piece of bone out of the top of my head and it was covered only by my scalp, I would not be considered to have a sound head, would I?
A. Yes, sir.
Q. And if the movements of my brain could be seen
115 through my scalp, I would still have a sound head?
A. Yes: you could have a sound head.

Q. And still be an able bodied working man in my profession?
A. No, sir, I won't say that.
Q. So, Scott Burbank, with the wound on his head, and the things that he had gone through—was he in your opinion a man capable of doing any work in the years 1909-1910?
A. Yes; in 1910.
Q. What could he have done?
A. A certain amount of advisory work.
Q. How much?
A. Such as looking after his own affairs; advising and counselling.
Q. A man that you would want to consult with and advise about business affairs?
A. About his own, yes.
Q. Not about yours?
A. Oh yes; if he was as conversant with mine as his own, yes.
Q. What did he do in your house in the period of 1909 anterior to his removal to Texas?
A. He simply acted the part of a guest.
Q. He was entertained?
A. Yes, sir.
Q. He remained around the house most of the time?
A. No, sir.
Q. He went abroad?
A. Yes, sir.
Q. Much?
A. Yes, daily.
Q. For how long?
A. He would be gone at times from three to seven hours.
Q. What was he doing?
116 A. His practice every morning was to take a walk every morning after breakfast—what he did while off I cannot state.
Q. Why, doctor?
A. Because I was not with him; at times I was home when he left and at times when he returned.
Q. Did you know that he consulted a physician in Chicago?
A. Yes, sir.
Q. Who was that?
A. Doctor Andrews.
Q. When was that?
A. In June, 1908.
Q. About what?
A. His head.
Q. The same trouble that Doctor Mates attended to?
A. No sir, the results of that trouble merely; this disfigurement.
Q. It was after the operation by Doctor Matas?
A. Yes, sir.
Q. What treatment did Doctor Andrews put him through?

A. None at all.
Q. What did he do?
A. He gave advisory treatment.
Q. What was it?
A. He consulted Doctor Andrews to find out whether or not there could be any relief from this disfigurement.
Q. It was concerning his personal looks?
A. Yes, that is all.
Q. To improve his beauty?
A. Yes; that was all.
Q. That was the wound on the head?
A. Yes; this disfigurement on the head.
Q. Why was that ?

A. The fact that there was no bone there; there was a
117 depression.

Q. Could you see the brain palpitating?
A. No, sir.
Q. How close was the brain to the scalp?
A. Do you mean in inches?
Q. Yes; have you any other way of gauging it?
A. The brain and scalp were probably adherent.
Q. That is not normal, is it?
A. No sir.
Q. Rather abnormal?
A. It might exist in a normal subject and not be known.
Q. I have been raised to the idea that any substance touching the brain or adhering to it would injure the mind of the person, and his brain affect him in some way?
A. Nature is self preservative and conservative.
Q. You want me to assume by that that accident or chance having deprived him of the normal covering for his brain, that nature has pushed forward some other protection for him?
A. It always does.
Q. And yet, as you surmise, the scalp, was attached to the brain and in your judgment it was a case of nature being self preservative and self conservative?
A. Yes, sir.
Q. And had taken this man who had passed beyond the class of normal and put him in the abnormal class?
A. I cannot agree with you.
Q. Would you not think that a man with the scalp growing to his brain would be abnormal?
A. What do you mean by abnormal.
Q. Abnormal, my dear sir, is something that is not normal?
A. If you refer merely to the skull it certainly would not be normal because of the absence of that piece of bone which was removed.

118 Q. I understood you to say that the chances were in this case that this man's scalp was adhering to his brain?
A. Yes, sir.

Q. With that premise I ask you was that a normal or abnormal condition in the human?

A. That is an unusual condition.

Q. And that being the condition you think it had no effect whatever on the man's brain?

A. It seemingly did not.

Q. If you were asked to give a professional opinion without seeing the subject as you physicians are sometimes asked to do, you would rather influence your mind to the other end?

A. I would not answer that question until I had a full and complete history of the patient.

Q. On the suggestion to you as an expert of some third person being thus afflicted, you would have paused before answering to know his history, before and after, in order that you could say whether or not in your judgment his brain was or was not affected?

A. Being a physician and surgeon I would not answer the question without a complete and a detailed statement of the symptoms before and subsequent to the operation and during the time that the patient or the case was presented to me.

Q. Now, doctor, did you go with Scott Burbank when he went from Rock Island to Texas?

A. No, sir.

Q. Did you ever see him alive again?

A. No, sir.

Q. Did you hear from him?

A. Yes, sir.

Q. Did you get letters from him?

119 A. Yes, sir.

Q. How many?

A. I would say at least two and I will answer further, to qualify that, if you will permit, that Mr. Burbank, never in his life, as far as I am able to learn, was a man that was used to write letters. He was always reticent and retired, so that when I did receive more than two letters I considered myself very fortunate.

Q. Were they very brief?

A. Yes, sir.

Q. You have preserved these letters?

A. One of them, I think.

Q. You haven't them with you?

A. No; but one letter I think is at home.

Q. He had often visited you at Rock Island?

A. No, sir.

Q. Were his visits confined to the period you have given in your direct examination?

A. No, sir.

Q. How many times did he visit you?

A. During the World's Fair, in St. Louis.

Q. That was the first visit?

A. Yes; I think it was.

Q. Then, again, when?

A. In June, 1908, and then in April, 1909.

Q. June 1908—was after he had taken sick?
A. Yes; after the operation.
Q. And after his mother died?
A. Yes, sir.
Q. And before his father died?
A. Yes; before his father died.
Q. Did he open a bank account in Rock Island, Illinois?
A. As to that I cannot say.
Q. Where did he keep his bank box with bonds?
120 A. In one of the banks in Rock Island.
Q. Do you know how many bonds he had?
A. No sir.
Q. You never looked into it?
A. No; I never counted it.
Q. While with you did he have this household stuff boxed and packed away?
A. Yes; I believe he used some of it; one of the boxes he had unpacked for some bed linen.
Q. When did he send the child to Texas?
A. She accompanied him, the father, to Texas.
Q. That was the first time she had ever gone there?
A. As to that I cannot state.
Q. Have you told me how old he was when he died?
A. I don't know that I have.
Q. I asked you once?
A. I cannot state positively; I really don't know his age.
Q. What sort of a looking man was he in the last two years?
A. Mr. Burbank had improved so wonderfully physically and otherwise that he was a typical specimen of a healthy man, I mean, to look at. And if you were to see Mr. Burbank sitting right here with his hat on you would think just as I do.
Q. That was when?
A. From 1909 up to the time of his departure, in February, 1910.
Q. And he was taking no medicine during that time?
A. Occasionally he was taking something, as his system demanded it.
Q. He was not even bothered by his nose?
A. He used a nose wash as a preventive treatment.
Q. He didn't need it at all?
A. No, sir; I didn't think so; and I advised against it.
Q. There was no bad smell coming from his nose?
121 A. No, sir, and as far as I know as a general practitioner, the trouble ceased.
Q. You are positive that no one else prescribed for him during that period?
A. Yes, sir.
Q. Whatever his intentions were to remain in Illinois, he abandoned them?
A. Yes; provided he liked Texas.
Q. And provided he did not like Texas?
A. He would come back to Illinois.

Q. So he would have an open door either way?
A. Yes; he would come back to us.

By Mr. RICE:

Q. After all this cross examination, Doctor, have you any modifications to make or suggest respecting the opinion that you have given concerning his capacity to make a will at the time when he left you in 1910.

A. I have. I am glad of the opportunity. It is the custom of our public school system for the scholars to bring home a report card, stating the character of work done each month in the public schools, and one month in particular the record was bad, and Mr. Burbank of his own volition took that child under his care and heard her lessons every day for a month or more until her cards had improved to his satisfaction.

Q. When was that, doctor?

A. My impression is that it was along in December, 1909, and January, 1910.

Q. That is last December and January?

A. Yes sir. I will say still further that it was his custom to buy magazines and bring them home for his own reading, and pleasure, and his further custom was daily upon coming down stairs before breakfast to gather the newspapers before we sat down for
122 breakfast, and frequently discussed the events of the day with me at the table.

Q. Intelligently?

A. Yes sir, intelligently; and further he noticed the receipt of a notice of the expiration of his subscription to the Picayune, which — about to expire, and without any consultation or suggestion on our part, he wired immediately a new subscription. He allowed it to go almost to the last day and that is the reason why he wired it.

Q. Do you recall any excentricities in his actions, manners or speech during the last nine months that he was with you?

A. Mr. Burbank simply continued to be himself, and I have tried to describe his disposition in answer to Mr. Dart's questions.

Q. Can you tell us whether during all that time it ever suggested itself to you that he was non compos in caring for his own affairs or in making contracts or in making a will?

A. No, sir; it certainly did not.

By Mr. DART:

Q. I understand you to say that he left you a strong, robust and remarkably well developed man, as the result of that Summer and Winter in Illinois, and went South because he could not stand the rigors of Illinois for another winter?

A. I said that the winter was so severe, and we had snow on the ground from the 3rd of December up to and including the last day of February. The first time during my residence in the North we had eleven weeks of continuous sleighing, and Mr. Burbank under careful dieting and careful attention did improve physically until he had the appearance of a robust, healthy individual.

Q. And when he left you he was in that condition?

A. Yes. Let me go on.
Q. Certainly.
A. Further, when he left us we expected that the estate of his father would be settled in March, and during the interim
123 he would have opportunity of making up his mind whether or not he wanted to remain in Texas, and then we would meet in March; but when he got into Texas he liked it so much that he concluded to remain. I am going to say one word further with your permission—that Mrs. Da Silva will tell you of other reasons that prompted him to go to Texas.
Q. He was in a sense, an invalid when he went to Texas?
A. No; he travelled alone with his daughter.
Q. He needed no physician?
A. No sir; not in my judgment.
Q. And yet in three months he died by his own hand?
A. Yes; you and I may do that before morning.

Mrs. MEMIE DA SILVA who being first duly sworn by Jefferson C. Wenck, Notary Public, did testify as follows:—

Direct examination by Mr. RICE:

Q. Mrs. Da Silva, Scott was your brother?
A. Yes sir.
Q. Elder brother?
A. Yes, sir.
Q. He was the oldest of the brothers and sisters?
A. No, sir; Ed was the oldest.
Q. He is dead?
A. Yes—you mean living ones?
Q. Yes, Madam?
A. He was the eldest living.
Q. Mrs. Da Silva, Doctor Da Silva has testified as to Scott Burbank's coming to Rock Island, and that in February last he went to Temple, Texas. Do you know why he went from Rock Island to Texas, from any statements made to you by him as to his
124 reasons?
A. Yes sir; I suggested that he should go there for a change on account of the cold; he complained bitterly of the cold, and I told him if my sister there would take charge of him and his daughter, I would be glad to be relieved of the responsibility.
Q. Do you know what had been his intention when he came to Rock Island about remaining and making it his home?
A. He came to make it his home with me.
Q. What did he say about residing in Louisiana for the future?
A. He said he would never reside in Louisiana again.
Q. Was that a frequent expression?
A. Yes sir; he said when he came to Rock Island that he came to stay, and he removed all his goods there, and he was to stay there with me.
Q. What did he say if anything respecting his intention to reside for the future in Texas?

A. Well, we had this understanding, that he should go down there on a visit, and if Anna would allow him to make his home there he would do so. He wanted to dwell with one of his family. He didn't have any wife and he wanted to make his home with his daughter.

Q. He had only one sister living in New Orleans?

A. Yes; only one.

Cross-examination by Mr. DART:

Q. What was the responsibility that you were glad to get rid of?

A. I felt that I had children of my own, and I thought that was all I could carry at the present.

Q. That had reference to his daughter as well as to himself?

A. As to himself he was capable of taking care of himself.

125 Q. He was a care to you as a house keeper?

A. No sir; he took care of himself and he was regular in his habits and I never considered him any trouble whatever.

Q. But you didn't want the child?

A I said I would take care of the child if Anna would not. Of course, we felt that one of us would do it.

Q. You suggested to him to look up a home elsewhere?

A. I suggested on account of the winters—that I didn't think he should stay there, and wherever his home was his child should be.

Q. You were willing to get rid of him if he would go without your putting him out?

A. No; I was willing to take care of Mary, but as long as I could have my sister do it I preferred it.

Q. You were glad to see him go South?

A. Yes; for his own benefit.

Q. You were not very sorry when he went?

A. No; I can't say that, because we were always good friends and chums.

A. As a matter of fact an extra mouth of a guest in a house is a great nuisance?

A. No sir; I don't consider it so.

Q. I don't know how you in the North view it, but I know how we do down here?

A. Oh, I have good help that I have had for six years.

Q. You suggested to him that it was a splendid opportunity to move somewheres else?

A. The climate was too severe and he could not stand it, and he did as any other Southerner would do.

Q. When he left you he left for good, providing he could get some one to take care of him there?

A. Yes; provided he could get cared for in a warmer climate and Annie could take care of him if she would because he could

126 stand the cold.

By Mr. RICE:

Q. How many children have you?

A. Two.

Q. How old are they?
A. My daughter is twelve and a half years old.
Q. How old was Scott?
A. 53 years old.
Q. Is your other child a boy?
A. Yes, sir.
Q. How old is he?
A. My boy is eight years.
Q. This daughter of Scott's, what sort of a child is she, bright child?
A. A very bright child and old for her years.
Q. What became of Scott's belongings that he had left at your home?
A. He wrote to me to have them sent to Texas, everything household goods and all.
Q. So, there is nothing remaining at your place in Rock Island, Illinois?
A. No sir; nothing.

Mrs. ANNA WOODSON, who being first duly sworn by Jefferson C. Wenck, Notary Public, did testify as follows:

Direct examination by Mr. RICE:

Q. You are the wife of Doctor Woodson?
A. Yes sir.
Q. Your home is in Temple, Texas?
A. Yes sir.
Q. Scott Burbank was your brother?
A. Yes, sir.
127 Q. Do you remember when he came to your home in Temple, Texas? About the date?
A. 10th of February.
Q. Was his coming a surprise or were you expecting him?
A. I was expecting him.
Q. He had arranged to come before hand?
A. Yes, sir.
Q. What reasons did he give before or after coming for coming to your place?
A. The severity of the Winter in Illinois.
Q. What did he say with respect to remaining permanently in Texas?
A. Just in a few days he was delighted with our climate and was able to be out of doors daily and he began to ask me if he could not remain in Temple and make his home with me.
Q. Your husband his testified that Scott Burbank contemplated buying a lot of ground and building thereon?
A. Yes, sir.
Q. Did you ever hear him express himself on that?
A. Yes, sir; there is a vacant lot in our immediate neighborhood; he spoke of that, and further, when he got his money from his

father's estate he would invest it all in school bonds in Texas. He said he intended to invest every cent in Texas.

Cross-examination by Mr. DART:

Q. What room did he occupy in your house?
A. The South East up stairs room.

By Mr. RICE:

Q. After Scott Burbank's daughter came to Texas, what did she do?
A. She was placed in the public school for about a month, and this female college was within easy reach from which she
128 could come home within forty five minutes when he phoned her, and her father and I consulted and enter her there. We thought she would have better advantages than at the public school.
Q. She was at school at the time of his death?
A. Yes; she was at school; she had just left home the evening previous.
Q. Do you know whether she wrote to her grandmother or corresponded with her while she was in Texas?
A. I don't know because her father had forbidden her to ever write to her grandmother, and the first I knew of it was when she told me that her grandmother sent her a box of little nic nacks and things. It was just about the time of his making his will; and I said to brother: Mary has a letter and a box from grandmother; he didn't like it, and said she had disobeyed him. He told me that he intended to give Mary everything in his will, and the stipulation he had made in his will was that he would let her receive her money at intervals after she became of age, on account of the grandmother; otherwise, we think he would not have made this stipulation.
Q. Do you know whether or not Mary wrote to her grandmother after her father's death?
A. She did. When we returned from the North, the first thing I had her do was to write, out of respect, a note to her grandmother.
Q. Did you see the reply?
A. She never replied, and I don't know whether she had written before.

By Mr. DART: Of course the testimony of what the child said to Mrs. Woodson is not evidence, and I object.

By Mr. RICE:

Q. Did your brother, Scott Burbank, ever give any reasons for not wanting the grandmother to have possession of the child?
129 A. Yes.
Q. What?
A. He said that she would be improperly raised by the grandmother; that he was paying for a negro nurse, and she had employed a negro boy to care for the child, and he objected to it, and my mother also made the same statement to me.

By Mr. DART: This is objected to.

Cross-examination by Mr. DART:

Q. You personally, have no knowledge that Mrs. Ernst did all of the things that are spoken of here by you, have you?

A. No sir, nothing but what my brother told me.

Q. And your brother told you that how long before he died?

A. When he would speak of the Ernsts ever having care or anything to do with Mary, that was one thing that he always dreaded.

Q. I asked you how long before he died?

A. I don't know just how long.

Q. Was it a month, six weeks or two months?

A. It was during his visit; whether a few weeks or a month afterwards; I can't say exactly.

Q. The child never had been in your custody before, had it?

A. No, sir.

Q. And she has been at school up to the time of her father's death, subject to being called home?

A. I had her from Saturday to Monday.

Q. Did you have a room for her?

A. Yes, sir.

Q. Or did she stay with one of your children?

A. No sir.

Q. So far as you know the girl received no answer from the letter to her grandmother?

A. As far as I know.

130 Q. Your policy is that she shall not write to her grandmother except under your eyes?

A. That was her father's wishes and as her guardian, I shall follow his wishes.

Q. And your wishes are that she shall have nothing to do with her grandmother and not respect her?

A. I have nothing to do with this.

Q. As a matter of fact, you yourself are not caring for this child?

A. I don't know anything of the family.

Q. I asked you where Scott Burbank slept in your house and you said the south east room—was that furnished by you?

A. Yes; except the bedding.

Q. He set up his own furniture in the house?

A. No, sir.

Q. He never unpacked any of his things?

A. No; except one box.

Q. What was in that; just this bedding?

A. The bedding and things of his child.

Q. He didn't intend to make his home with you?

A. He certainly did.

Q. I thought you said he intended to build himself a home?

A. He spoke of that.

Q. Since his death, you only say that he said that casually that he would buy and build for himself?

A. That is what he said.

Q. Then his intention, as far as you know, as expressed to you was if agreeable to you he would live with you?

A. Yes; he would care for himself and his child the rest of his life.

Q. The child is in college, and you only see her from Friday to Monday? Do you send your own child off that way.

A. I have only boys.

131 Q. How old is your oldest boy?

A. Fifteen years.

Q. Do you send him to any school?

A. Not so far.

Q. Have you a girl?

A. Yes sir.

Q. How old?

A. Just eight years old.

Q. All that you see of your brother's child is from Friday evening to Monday morning; is that it?

A. That is the way it has been during her father's life time; she can speak to us by telephone any time, and it is just forty five minutes' ride home.

Q. Is that a sectarian school?

A. Yes sir.

Q. Run by whom?

A. It is called the Baylor Female College.

Q. What sect has charge of it.

A. The Baptists.

By Mr. DART: This testimony is taken by consent?

By Mr. RICE: Yes sir.

By Mr. DART: It is under the commission, but it is taken by consent?

By Mr. RICE: It would have been taken by consent.

By Mr. DART: Then what shall we do with the Notary's commission.

By Mr. RICE: Just let him make return on the commission that this testimony was taken by consent of all parties and all formalities waived.

Mrs. JOSEPHINE ERNST, who being recalled did testify as follows:

132 By Mr. DART:

Q. Mrs. Ernst, did you hear the testimony just given by Mrs. Woodson?

A. Yes sir.

Q. About something that Scott Burbank had said?

A. Yes, sir.

Q. Did you ever do anything of that kind in your life?

A. Never.

Q. Have you always had servants?

A. Yes sir, always.

Q. And the means always to have good servants?

A. Yes, sir.
Q. When this child was in your custody what attention did she get?
A. The best by me, personally.
Q. Did you receive a letter from the child announcing the death of her father?
A. Yes, sir.
Q. Did you answer it?
A. Yes, sir.
Q. Where did you mail the letter to?
A. To the Baylor Female College.
Q. Did you answer it personally.
A. Yes, I did.
Q. Did you send that gift before the child was in Texas?
A. It was while she was in college.
Q. You sent it at your own suggestion?
A. Yes sir.

Cross-examination by Mr. RICE:

Q. Mrs. Ernst you answered the letter that she wrote after you had received the letter from the child?
A. No, sir.
Q. It was after the death of her father?
A. Yes, sir.
133 Q. Did you mention her father's death?
A. I told her I was sorry to hear of her father's death.
Q. Are you certain that you mentioned the father's death?
A. Yes.
Q. Be careful of that; the letter can be produced; I have it.

By Mr. DART: I call for it because it was just sworn that no such letter was sent.

By Mr. RICE:

Q. You won't state whether or not you are positive?
A. No; I won't say whether I said positively about her father; I did say; Be a good little girl; I did say that; I am positive about it.

By Mr. DART:

Q. Did you ever in any way attempt to influence her against her father or interfere with her father's wishes as far as you know them?
A. Never, never, never, sir.

A true and correct report,
(Signed) A. E. OLIVEIRA,
Stenographer.

(Endorsed:) No. 93,752. Div. C. Succession of T. Scott Burbank. Testimony. Filed November 5th, 1910. (Signed) Joe Garidel, D'y Cl'k.

134 *Answer of James M. Woodson and Wife to Petition to Annul Will.*

Filed July 15, 1910.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

CIVIL DISTRICT COURT,
Parish of Orleans:

And now comes James M. Woodson, and his wife, Anna M. Burbank, residing in Bell County, Texas, personally as Testamentary Executors of the last will and testament of T. Scott Burbank, named above, and Mamie E. Burbank, wife of Dr. Joseph De Silva, to authorize his wife, of the State of Illinois, and for answer to the petition of Josephine Ernst, tutrix of the minor, Mary Springer Burbank, says that true it is that the last will and testament of said deceased has been duly admitted to probate at the place of his domicile, in the County of Bell, State of Texas, and that your respondents, James M. Woodson and his wife, Anna M. Burbank, have in the county Court of the County of Bell, State of Texas, been recognized and have qualified, respectively as Executor and executrix of his estate, and that letters testamentary therein have issued to him, all of which will more fully appears from the exemplified copy of proceedings had in said court, heretofore filed in this record, and now and each and every part thereof made parts of this answer; and that they are in fact and law the duly qualified Testamentary Executor and Executrix, respectively, of the estate of said deceased.

And respondents further aver that said last will referred to in said petition not only purports to be, but is, in fact and law, the last and valid will and testament of said deceased, and not only purports, but does in fact and law constitute the respondents,
135 James M. Woodson and Anna M. Burbank, his wife, respectively, Executor and Executrix of said last will.

And respondents deny that the said last will and testament was not in truth and fact the last will and testament of said deceased; that it was not made by him understandingly and at a time when he was not mentally competent to make the same.

They deny that he was suffering from any illness or disease of the brain, or otherwise, in any wise rendering him mentally incompetent to make said last will, as alleged in said petition, and to understand the same, when made and signed by him.

They deny that the deceased was a citizen of Louisiana or a resident of the City of New Orleans, at the time of making said last will; but aver that when said last will was made, the said testator was legally domiciled in Temple in the State of Texas, and was a citizen of that State, and was not domiciled elsewhere.

For further answer they aver that said testator, T. Scott Burbank,

was possessed of large property, both in the States of Texas and Louisiana; that his property in Louisiana consisted and yet consists of his undivided share or interest in and to the Successions of his deceased father, Edward W. Burbank, and of his mother, Anna M. Burbank.

They further deny that said last will is null because or on account of any of the matters alleged in said petition; and as to all other matters and things not herein admitted or answered to, they deny the same to be true.

And the said James M. Woodson and Anna M. Burbank, his wife, as Testamentary Executors of the said last will and testament of T. Scott Burbank, duly admitted to probate as hereinbefore
136 averred, aver further that they have filed herein an exemplified copy of the proceedings had in the County Court of Bell County, a court of record and competent jurisdiction in the premises, wherein judgment has been rendered, as by said exemplified copy shown, admit-ing said last will to probate, and your respondent recognized, as, respectively Executor and Executrix of said last will, and as having duly qualified as such, and that Letters Testamentary issued to them in compliance with the laws of said State; and that they have heretofore filed their proper proceedings in this cause, praying for the registry of said will and for recognition as provided for by Articles 1681 and 1682 of the Civil Code of Louisiana, as they had the legal right to do, and as it was the mandatory duty of the court to order, and that they in no wise waive the relief prayed for by them in said proceedings by any of the matters or averments in this answer, but insist upon said relief being granted.

Wherefore, respondents pray that the said petition of Josephine Ernst Tutrix, be dismissed, with costs, and that they have all general relief.

(Sg.) RICE & MONTGOMERY.
A. E. BILLINGS,
Of Counsel.

Motion and Affidavit for Commission for Evidence of Dr. Joseph De Silva and Memie E. Burbank, His Wife.

Filed July 15th, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

On motion of Dr. Jmes M. Woodson and his wife, Anna M.
137 Burbank, by him duly aided and authorized, through their counsel, Rice and Montgomery and Alfred E. Billings and on suggesting to the court that the testimony of Dr. Joseph De Silva, and of his wife, Memie E. Burbank, who reside in the City of Rock Island, County of Rock Island, State of Illinois, is material and

necessary to them in support of their application to be recognized as, respectively, executor and executrix of the last will and testament of said deceased and to have his said will, duly admitted to probate and execution in the County of Bell, State of Texas, registered as required by law.

It is therefore ordered by the Court that a commission issue directed to any Notary Public in and for said County of Rock Island requiring him to take the testimony of said witnesses in answer to interrogatories to be propounded to them on said behalf; their answers to said interrogatories to be to said commission annexed, and that he be ordered to make return of his acts and doings under said commission within fifteen days from the date thereof.

(Sg.) E. K. SKINNER, *Judge.*

Personally appeared Charles S. Rice one of the counsel herein for Dr. James M. Woodson and Anna M. Burbank, his wife, both absent from the State and otherwise unrepresented above named, who being by me duly sworn deposed and said that he is of counsel for said movers and that all and singular the grounds set forth in the foregoing motion are true to the best of his knowledge, information and belief.

(Sg.) CHAS. S. RICE.

Sworn and subscribed before me, this 15th day of July, 1910.

(Sg.) JOE GARIDEL, *D'y Cl'k.*

138 *Notice of Cross-interrogatories and Sheriff's Return on said Notice.*

Filed July 18, 1910.

State of Louisiana, Civil District Court for the Parish of Orleans.

No. 93752.

Succession of T. Scott Burbank.

To Dart & Kernan, of Counsel for Mrs. Josephine Ernst, Legal Tutrix of the Minor Mary S. Springer:

Whereas, the plaintiffs in the above entitled cause, this day filed in the office of the Clerk of this Court certain interrogatories a copy of which accompanies this notice, propounded to Dr. Joseph De Silva and Memie E. Burbank, his wife, witnesses on behalf of Dr. James M. Woodson, and his wife, Anna M. Burbank, witnesses for said Dr. James M. Woodson and his wife, Anna M. Burbank residing at City of Rock Island, County of Rock Island, Illinois whose answers to the said interrogatories are to be taken under commission for that purpose to be issued and to be read in evidence on the trial of said cause.

You are notified to propound such cross-interrogatories as you may

deem necessary, and leave the same at this office within three days from the service hereof.

Clerk's Office, Civil District Court, this 15th day of July, 1910.

(Sg.) J. G. LYNCH, *D'y Cl'k.*

139 *Sheriff's Return to Above Notice to Cross.*

Received Friday July 15, 1910, and on the 15th day of July, 1910, I served a copy of the within Notice to Cross and accompanying interrogatories on Dart, Kernan and Dart, counsel for Mrs. Josephine Ernst, legal tutrix of the minors Mary S. Springer, herein named by personal service on Wm. K. Dart of the law firm of Dart, Kernan & Dart, her attorneys.

Returned same day.

Sheriff's fees $1.00.

(Sg.) JOHN E. VILLA,
Deputy Sheriff.

Motion for a Commission to W. S. Lemly, Notary Public in and for the County of Bell, State of Texas.

Filed July 25, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

On motion of Dr. James M. Woodson, and of his wife, Anna M. Burbank, by him duly aided and authorized, through their counsel Rice & Montgomery and Alfred E. Billings and on suggesting to the Court that the testimony of W. E. Willis, Dr. William M. Woodson, W. S. Rowland, Charles M. Campbell, A. J. Jarrell, Dr. A. G. Scott, Dr. R. R. White, Dr. O. F. Gober, Dr. Sidney Israel, Rev. B. A. Hodges, Dr. J. M. Murphy, Miss Mirt McGillivery, Miss Clara Willis, Charles S. Cox, R. K. Henderson, Rev. J. E. Green,

140 H. K. Black, N. C. Erskine, H. M. McCelvey, Sr. Katherine Coon, Vernie Merrill, Lewis Robertson, Charles Russell, H. M. Brown, Enoch Barber, Dr. R. S. Hyer, Walter S. Rowland and Hon. W. S. Banks is material and necessary to movers on the application made by them to be recognized as, respectively, executor and executrix of the last will and testament of said deceased and for registry of exemplified copy thereof, and is further material and necessary for their defense and that of their co-defendants in a proceeding filed herein by Mrs. Josephine Ernst, legal tutrix of the minor Mary Springer Burbank, and thereby they expect to prove that the said deceased, T. Scott Burbank, was domiciled at and prior to his death, at Temple, in the State of Texas, and that he was of sound mind and mentally and otherwise capable, on March 22nd, 1910, to make a

valid last will and to comprehend and understand the same when made, and in every way competent to make the same; that said witnesses reside in and in the neighborhood of Temple, Bell County, Texas, and that to procure said evidence it is necessary that a commission issue;

It is therefore ordered by the court that a commission issue directed to W. S. Lemly, Notary Public in and for the County of Bell, State of Texas, or any other Notary duly commissioned and qualified in said County to take the testimony of said witnesses in answer to interrogatories filed with this motion and to be propounded to them on said behalf and to be answered under oath and that the said commission be returned to this Honorable Court within thirty days of its date and that the order in this behalf entered herein on July 15th, 1910 be vacated.

(Sg.) W. B. S.

141 Personally appeared Charles S. Rice, one of the counsel herein for Dr. James M. Woodson and Anna M. Burbank, his wife, both absent from the State and otherwise unrepresented above named, who being by me duly sworn deposed and said that he is of counsel for said movers and that all and singular the grounds set forth in the foregoing motion are true to the best of his knowledge, information and belief.

(Sg.) CHAS. S. RICE.

Subscribed and sworn to before me, this 25th day of July, 1910.

(Sg.) W. B. SOMMERVILLE, *Judge.*

Notice of Interrogatories and Sheriff's Return Thereon.

Filed July 27, 1910.

State of Louisiana, Civil District Court for the Parish of Orleans.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

To Mrs. Josephine Ernst, legal tutrix of the minor Mary Springer Burbank, through her attorneys of Record, Dart, Kernan and Dart, New Orleans, Louisiana:

Whereas, James M. Woodson and his wife, Anna M. Burbank, in the above entitled cause, this day filed in the office of the Clerk of this Court certain interrogatories, a copy of which accom-

142 panies this notice, propounded to W. E. Willis, Dr. William M. Woodson, W. S. Rowland, Charles M. Campbell, A. J. Jarrell, Dr. A. G. Scott, Dr. R. R. White, Dr. O. F. Gover, Dr. Sidney Israel, Rev. B. A. Hodges, Dr. J. M. Murphy, Miss Mirt McGillivery, Miss Clara Willis, Charles S. Cox, R. K. Henderson, Rev. J. E. Green, H. K. Black, N. C. Erskine, H. M. McCelvey, Sr. Kath-

arine Coon, Vernie Merrill, Lewis Robertson, Charles Russell, H. M. Brown, Enoch Barber, Dr. R. S. Hyer, Walter S. Rowland and Hon. W. S. Banks witnesses for said James M. Woodson and his wife Anna M. Burbank, residing at or in the neighborhood of Temple, Bell County, Texas, whose answers to the said interrogatories are to be taken under commission for that purpose to be issued and to be read in evidence on the trial of said cause.

You are notified to propound such cross-interrogatories as you may deem necessary, and leave the same at this office within three days from services hereof.

Clerk's Office, Civil District Court, this 25th day of July, 1910.

(Sg.) J. G. LYNCH,
D'y Clerk.

Sheriff's Return to Notice.

Received Monday, July 25, 1910, and on the 25th day of July, 1910, I served a copy of the within Notice to Cross and accompanying Interrogatories on Mrs. Josephine Ernst, legal tutrix of the minor Mary Springer Burbank herein named by personal service on Wm. K. Dart of the law firm of Dart, Kernan & Dart, her attorneys of record.

Returned same day.

Sheriff's fees $1.00.

(Sg.) JOHN E. VILLA,
Deputy Sheriff.

143 *Rule (Copy of) James M. Woodson and Wife and Sheriff's Return Thereon.*

Filed October 21, 1910.

Civil District Court for the Parish of Orleans.

No. 93752.

Succession of T. Scott Burbank.

On joint motion of Dr. James M. Woodson and of his wife, Anna M. Burbank, who have been appointed executor and executrix under the last will and testament of said T. Scott Burbank, and have qualified as such in proceedings legally had in the County Court of the County of Bell, State of Texas, a copy of which proceedings, with copy, of said will have been heretofore filed herein through their counsel of record, Rice & Montgomery and A. E. Billings, and on suggesting to the Court that the certain commissions issued herein, one on the 3rd day of August, 1910, directed to W. S. Lemly, Notary Public, in and for the County of Bell, State of Texas, or any other Notary in and for said county of Bell, State of Texas, to produce the evidence of W. E. Willis and others therein named, the other on the 25th day of July, 1910, directed to any Notary Public

in and for the County of Rock Island, State of Illinois, to procure the evidence of Dr. Joseph De Silva, and another for the purposes shown in the motions for said commissions and in the caption to and body of the Interrogatories annexed to said Commission.

And on further showing that said Commissions have been executed and with the testimony taken thereunder have been returned to the Clerk's Office of this Honorable Court.

144 It is ordered, that Mrs. Josephine Ernst, Tutrix of the minor Mary Springer Burbank, show cause on Friday the 21st day of October, 1910, why the depositions taken pursuant to and annexed to said Commissions, respectively, should not be used as evidence in this cause, on behalf of movers.

A true copy.

(Sg.) JOE GARIDEL, *D'y Cl'k.*

Sheriff's Return Thereon.

Received Saturday Oct. 15, 1910, and on the 17th, day of October, 1910. I served a copy of the within rule on Mrs. Josephine Ernst Tutrix of the minor, Mary Springer Burbank, defendant in rule, by personal service on H. P. Dart, Sr., her attorney.

Returned same day.

Sheriff's fees 50 cts.

(Sg.) JOHN E. VILLA,
Deputy Sheriff.

145 Civil District Court, Parish of Orleans, Division "C".

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Evidence on Behalf of Plaintiff in Rule to Read Testimony Taken under Commission, Taken in Open Court, Friday, October 21st, Before the Honorable E. K. Skinner, Judge Presiding.

By Mr. RICE: In support of the rule, I offer in evidence the motion for commission to take the testimony of Dr. Joseph De Silva and his wife, Mimi A. Burbank, filed July 15th, 1910, together with the affidavit thereto annexed; notice of the service of the interrogatories and the return thereon, filed herein on July 18th, 1910.

Motion for commission to take the testimony of W. E. Willis and others, together with the affidavit thereto annexed, filed on the same day, and the notice of service of said interrogatories, together with the return thereon filed herein on the 18th of July, 1910.

Also motion filed herein on the 22nd of July, 1910, to substitute in the place and lieu of James J. Binkley's name in the original motion, that of W. S. Lemley, Notary Public.

Also motion for commission to take the testimony of W. E. Willis and others herein and the affidavit thereto annexed filed herein July 25th, 1910, together with a copy of the notice of service of said interrogatories and the return thereon, filed herein on July 27th, 1910.

Also commission issued to W. S. Lemley, dated August 3rd, 1910, to take the testimony of W. E. Willis; also the testimony thereto attached of the several witnesses, and the certificate of the Notary; and the return thereto attached, together with the interrogatories accompanying said commission, and the envelope directed to the Clerk of the Civil District Court, Parish of Orleans, New Orleans, Louisiana, enclosing said depositions, together with the certificate on the obverse and reverse on said envelope.

Also offer in evidence the depositions of Dr. Joseph De Silva and wife, referred to in the foregoing offer, taken before
146 ——— Notary Public, of Rock Island County, Rock Island, Illinois, together with the commission thereto attached; the interrogatories thereto attached, and the depositions taken thereunder, together with the certificates of the Notary thereto attached, including the certificate of the Secretary of State, showing his capacity to act as Notary Public.

By Mr. DART: I object to the interrogatories propounded in each commission, on the ground that they are leading and suggestive, I object to the testimony given thereunder, on the ground that the answers are leading up and suggested by the interrogatories; and I further object to the evidence of the witnesses, on the ground that said evidence is based upon hearsay.

By the COURT: I will reserve your right, Mr. Dart, to object to the testimony when read, and I will just make the rule absolute.

Endorsed on back: No 93752. Civil District Court, Div. C. Succession of T. Scott Burbank. Evidence taken on rule to read testimony taken under commission, Oct'r 21/10. Mr. & Mrs. Woodson, Executor and personally, etc. Filed October 21st, 1910. (Sg.) Joe Garidel, D'y Cl'k.

147 Civil District Court for the Parish of Orleans, Division "C".

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Testimony of Dr. Rudolph Matas, a Witness on Behalf of Dr. James M. Woodson and his wife Anna M. Woodson, Testamentary Executors of the Succession of T. Scott Burbank, and Individually, and Dr. Joseph De Silva and of His Wife, Memie E. De Silva, Defendants, Taken under Revised Statutes, Section 621, Before Alexis Brian, Notary Public and Commissioner, at His Office No. 619 Godchaux Building, at 2:45 o'clock p. m., October 25th, 1910.

Present:

Messrs. Charles S. Rice and Alfred E. Billings, representing defendants.

Mr. Henry P. Dart, representing the plaintiff.

Witness being duly sworn, testified as follows:

Direct examination by Mr. RICE:

Q. Your full name Doctor?
A. Rudolph Matas.
Q. Your residence?
A. 2255 St. Charles Avenue.
Q. Your profession?
A. Physician.
Q. How long have you been surgeon and physician?
A. Since 1880.
Q. Practicing mostly in New Orleans?
A. Always.
Q. Your business has been slight or extensive—your practice, I mean?
A. Well, I have had an extensive practice.
Q. You are connected with any of the public institutions
148 or the City hospitals?
A. Yes; I have been visiting surgeon of the Charity Hospital since 1880 and senior surgeon at the Touro Infirmary.
Q. Please tell us did you know Thomas Scott Burbank during his life time?
A. Yes, sir.
Q. Did you have occasion to treat him medically or as surgeon?
A. Yes. I was called to see him a few days before performing an operation in March. I saw him in February for the first time.
Q. Of what year?
A. 1908.
Q. When you first saw him what was his condition?

A. He was then suffering from an abscess of the brain.

Q. Do you remember whether he was paralyzed?

A. He was weak in the extremeties—one of the symptoms of abscess. He was paralyzed by abscess of the sinus of the brain.

Q. Do you remember whether he had a faulty speech at that time?

A. Defective speech. Stupor and sombreness.

Q. You operated on him, as I am informed. Give an account of the necessity and of the operation?

A. Of the necessity, it was evident that he would die if something did not happen for his relief. He was showing all the signs, as previously stated, of abscess of the brain, which were becoming worse day by day, so that on Sunday, March 1st, with the entire concurrence of his family, we brought him to the Touro Infirmary and I operated upon him. The operation consisted in opening the skull and draining an abscess which was found in the
149 anterior lobe, frontal lobe of the left hemisphere of the brain. The symptoms of the abscess were relieved remarkably soon in this case—about three days. His intelligence came back to him. The weakness of palsy disappeared almost completely. His fever disappeared, abated. In fact, he became steadily better from that day on. The first dressing was removed one week after and the wound was found practically healed. His mental condition continued to improve and he left the hospital—I don't remember the exact date now—apparently well and continued well.

Q. Up to how late, doctor, had you him in charge?

A. Until leaving the infirmary, and then he came to see me at my office at various times—once a week in the beginning and then after that once a month, and then at longer intervals. The last time I saw him at my office was on February 13th, 1909, last record.

Q. That was nearly a year after the operation had been performed?

A. Yes; the operation was on March 1st, 1908.

Q. What was his condition, mental and physical at the time when you saw him in February, 1909?

A. When I saw him last I thought he was just as I had seen him before; there was no notable change in his condition that I could see. He had his mind just as I was accustomed to seeing him; in fact, perfectly rational. The only thing I may say in connection with that and which gave me some concern was that sometime after the operation, perhaps three or four months, I was told that he had jerks on the opposite side of his body, without interruption in his consciousness, but just jerkings. I was afraid he would de-
150 velop epilepsy, but he never did develop any signs up to the time that I saw him; nothing further than jerkings.

Q. Did you ascribe his condition when he first came to you to any cause that was obvious?

A. The abscess.

Q. Was there a special cause for that?

A. Yes; it was distinctly traceable to a suppuration or abscess in the frontal sinus.

Q. There had been a previous operation for that, had there not?

A. You might call it an operation, but it would be better distinguished as a treatment to drain the sinus.

Q. That was the operation?

A. Yes.

Q. Now, doctor—

A. I will state about that previous treatment that I only knew of that by the statement of the family and the relatives.

Q. After your treatment of him immediately after the treatment, I understand you saw that his mental condition was clear?

A. In perfectly rational condition.

Q. When you saw him last in February, 1909, what was his mental condition as compared with?

A. I found him in first-class mental condition.

Q. If no operation had been performed such as you describe, what would have been the probable mental condition of Burbank?

A. He would have died positively.

151 Q. The operation was performed then?

A. Yes.

Q. Now naturally after such an operation what condition of brain, of mentality would be apt to follow?

A. The operation itself would not have affected the mental state. The operation itself would not, because there was no removal or destruction of brain substance. All that was done in order to drain the pus; there was no removal.

Q. As a matter of fact I understand when you last saw him you considered the condition of his brain or condition of his mental health what?

A. Just as I had seen him after his immediate recovery. This was about a year after his immediate recovery, and I found the condition about the same as immediately after his recovery.

Q. The petitioner in this case is attacking a certain will made by the deceased in March 1910, on the ground substantially that he was mentally incompetent to make a valid will; was there in his condition when you last saw him, when you treated him after the operation, when you saw him in February, 1909, to indicate whether or not he was mentally capable of making a good and valid will?

A. When I saw him last he was perfectly able to make any valid will, I should think, because he knew his own mind perfectly. He was perfectly rational, answered all questions asked him like an intelligent man and in no way showed any mental incompetence that I could see.

Cross-examination by Mr. DART:

Q. Doctor, do you know the history of the patient anterior to his arrival in your hands?

152 A. The medical history insofar as it related to the disease of the brain that I was called upon to treat, yes, sir.

Q. How long did you find that condition to have existed?

A. The condition that antedated the abscess was an old infection in the frontal sinus; that is, one of the chambers of the nose. I believe that it had been in existence for months.

Q. Situated where?

A. In the frontal bone, in the frontal sinus.

Q. Tell us what the frontal sinus is, as distinguished from something else?

A. It is a hole in the frontal bone in the forehead. It is on both sides of the nose. Two sinuses connect and lead to the nose by separate openings.

Q. And that disease of the nose and frontal sinus had infected the brain behind, or what, doctor? What did it infect?

A. After the sinus had become infected the infection spread beyond the wall of the sinus and attacked the membranes of the brain itself.

Q. Does the brain itself lie behind this sinus?

A. The brain lies behind the bone, and the membrane- lie in contact with the bone.

Q. And this bone is the wall of the sinus that was diseased?

A. Yes.

Q. The infection had spread to the bone then on the left side of the frontal hemisphere?

A. Yes.

Q. And was technically a disease of the brain which would have killed him had he not obtained relief from it?

A. Yes.

153 Q. And to obtain relief you made an incision in the bone of his skull.

A. Yes.

Q. At what point?

A. On the left side of his skull in the left parietal and frontal bone. It was quite a large flap. It took a large flap out of the bone.

Q. What size?

A. About two-and one-half inches on its longest diameter.

Q. That means a piece of the skull of that diameter had been removed in order to reach the source of the disease?

A. Yes.

Q. To reach the source, you had to touch the membrane.

A. Yes.

Q. What was the operation exactly?

A. After reaching the first membrane, dura mater, that is the toughest membrance, then we cut into this and then recognized the source of the suppuration, pus, which was lying in the lesser membrances of the brain proper, but upon the brain. The pus was lying between the lesser membranes and the brain.

Q. In contact with the brain?

A. In contact with the brain, yes.

Q. And affecting the brain.

A. Yes, affecting it.

Q. In other words, the injury to the membranes would not have caused this trouble if it had not already affected the brain?

A. That is rather difficult to get at.

154 Q. What lies in my mind, doctor, is, would the inflam-ation of the membrane which had resulted from the presence of pus, by itself have forced the physical condition on the patient which you found him in?

A. The simple affection of the membranes you mean?

Q. Yes?

A. It would not have been exactly the same type, but it would have ended the same way.

Q. Because the pus would ultimately have injured the brain?

A. Yes.

Q. In other words, pus representing inflam-ation and infection, would have pursued its course to all that lies about it, unless it would have been withdrawn?

A. In this diffused form of infection, it would have killed the patient before it would have had a chance to destroy much of the brain, because it had more of a miningeal type. Some abscesses are inside of the brain—originate inside of the brain, and others are outside of the brain between the membranes and the rind of the brain. In this instance, it was in the membrane on the outside, between the membranes and the brain itself.

Q. Your cure for that was to drain the pus out; we are not interested in how you did it?

A. Yes.

Q. It left the patient relieved of the danger in which you found him and restored him to the condition in which you have described, that is, he left the hospital, reported to you from time to time—I suppose that he had to report to you?

155 A. Yes.

Q. You learned from him that he was affected by this jerking of the opposite side of his body, which indicated to your mind an incomplete cure, or a further development of his disease?

A. First of all I will state that these jerkings came on quite a long time after he had left the infirmary, and they were at comparatively longer intervals. They were not associated with mental disturbances of any kind that I know of. But if they had continued I was afraid they might have ended in epilepsy.

Q. Which is another form of brain disease?

A. Yes, sir. Now I wish also to qualify another thing: that there are several types of epilepsy, and the type that I feared in this case was what is known as Jacksonian epilepsy, in which the mind is not so much affected as in other epilepsy—so-called general or idiopathic epilepsy—that form in which there is a complete loss of consciousness, with general convulsions not limited to a certain group as in this case.

Q. Doctor, what effect has the excessive use of alcohol on the brain, spirit-ous drinks you know?

A. That is a relative effect, a matter that varies a great deal with the individuals.

Q. To be very direct with each other, I do not think it would be disputed Burbank had been in the habit of using spirit-ous liquors excessively anterior to the time you treated him. Does that not affect the recovery from a disease such as he had?

A. I do not think it had any direct relation in this instance.

Q. Would it have had any effect in the future?

156 A. If he had kept on he would have become an alcoholic, I mean he would have shown evidence of marked alcoholism.

Q. Quicker than usual?

A. I would say so. What I would say is that his disease of the brain had no relation to alcohol. Neither do I think that his sinus affection had anything to do with that.

Q. With the disease of the sinus?

A. Yes.

Q. What caused the pus in his brain? Where was it created?

A. It is presumed that the germs of suppuration migrated from the sinus to the membranes of the brain by contact.

Q. That is very clear to me. Now, you say he was very slow of speech. Would that also apply that he was slow in expressing himself?

A. Well, slow in speech like people who are slow in speaking, when the slowness of speech is not due to defects in the organs of speech, but slow speech.

Q. Then he was a slow heavy man in that regard?

A. Yes.

Q. What we know as a slow heavy man?

A. Slow and heavy.

Q. What you would call a silent man as distinguished from a talkative man?

A. I never would call him talkative.

Q. He was a silent man?

A. Yes.

Q. You never saw him after February, 1909?

A. No, sir.

Q. You do not know what were the further developments in his case?

A. I do not know except that his death—I knew he died, but it was some time after. I was surprised to hear it.

157 Q. He died a year after by his own hand, committed suicide?

A. Yes.

Q. Was the condition of his nose cured when he left your hands?

A. That I am not certain of. He had not complained any more of his nose.

Q. Did you cure the inflamed or aggravated condition of the frontal sinus?

A. No, I did not treat that at all because at the time I was called to treat him, I understood the sinus was drained or draining thoroughly. That was not giving him any trouble at that time. That is what I would judge by looking at him; I made no particular examination.

Q. If that condition of the nose returned, it would develop in the same direction, would it not?

A. If an obstruction had again developed, the same kind of obstruction as before, he would have been liable to the same effect—as long as there was drainage, so that the contents of the sinus could be discharged, that risk was at a minimum.

Q. If the patient found it necessary to consult a physician concerning that condition of his nose and face again, that would leave on your mind an impression that he needed attention, would it not?

A. If he had consulted someone yes; although I might qualify that by saying that he might have been anxious to satisfy himself about his nose, wish to have it inspected.

Q. Had he had any operation at that time? Were there any signs on his face of a surgical operation?

158 A. No, I do not remember any.

Q. Can you conceive of a surgical operation to reach the sinus?

A. Through the nose, yes, without leaving a mark.

Q. Can you conceive of one that leaves a mark outside of the nose?

A. Yes.

Q. Suppose the frontal sinus had needed surgical attention, and had been treated by a surgeon exteriorly; about where and how on on the face would the treatment be made?

A. If it had required opening by an exterior route, not by the interior of the nose, it would have been along the line of the eyebrow.

Q. Beginning at the arch of the nose, along the eyebrow opening up the frontal sinus; that is a surgical operation, is it?

A. Yes.

Q. You did not do it that way?

A. No.

Q. When you removed the bone of the skull it was not replaced?

A. No.

Q. What was left between the membranes of the brain and the outside?

A. The bone alone was removed. The bone covering, the muscle and the entire thickness of the scalp remained.

Q. Looking at it from measurements—ells or inches, about what thickness of covering lay between the ear and the membranes?

159 A. I should say half or three-quarters of an inch; three-quarters of an inch I am sure.

Q. Did the subtraction of the skull leave a cavity?

A. Yes.

Q. Doctor, was it possible to see the pulsation of the brain in that cavity?

A. Not so much seeing as feeling.

Q. Was it a comfortable or uncomfortable sensation to the man so situated?

A. I do not believe from what he told me that he noticed any pulsations, but he was annoyed by the deformity.

Q. Was it under his hat or outside?

A. Under his hat.

Q. Was it a weakness in the structure of the skull?

A. Naturally the bone was missing, leaving only the soft parts.

Q. A surgeon coming after you and looking at that, if he were a surgeon, ought to be able to describe that condition straight?

A. Yes.

Q. What would be the effect of contact with the brain by any of the membranes?

A. There was no direct contact with the covering of the brain proper because the dura mater, which is the outer sheet of the brain, was closed up. There was no direct contact of the skull covering with the senior membranes or envelopes of the brain.

Q. What tendency in the sickness alone, would a man develop in a case of that kind?

A. There are many men who suffer a loss of skull without apparently suffering any consequences that are known except that there is a weaker spot of the skull which is naturally more vulnerable. Many men have gone through their lives with half of
160 their skulll off.

Q. Surgery requires the interior to be protected in some way, doesn't it?

A. Not necessarily in every case. You mean by that to replace some of the bone?

Q. Yes?

A. Not necessarily, because the dura mater hardens in the course of time, and offers a very fair protection.

Q. How long?

A. That varies with age and individuals.

Q. How old was this man?

A. Beyond 40.

Q. Nearer 50 than 40?

A. Possibly so.

Q. What has been your experience in such cases?

A. The bone does not ossify early at that age. It might take months or years and may never.

Q. The bone would ossify quicker in a child?

A. It will ossify more promptly.

Q. You as a matter of fact recommended something to protect the cavity, did you not?

A. Well, I advised him to always wear a cap.

Q. You also advise protection in some other way, didn't you?

A. I suggested that if it worried him, in time we would try to replace the lost skull by a graft or substitute.

Q. A man with that sort of injury, with the disposition of your patient, would develop under the injury certain of his characteristics more than others, would he not? For instance a condition of that kind makes a man more irritable, more subject to petulence, doesn't it?

A. That is a question you cannot answer positively. It may be the reverse.

161 Q. Granted a previous tendency—to any particular thing; to irritability for instance?

A. It might be accentuated; it might be otherwise; we cannot say. I would say nothing positive on that.

Q. You have no experience?

A. I cannot say about that. It all depends on whether the patient has been diseased or not. If he was normal he will continue to enjoy the same mental faculties.

Q. What was the physical condition of Mr. Burbank at the time he *must* came under your care, without regard to his disease? Describe him, won't you please, doctor?

A. *Might* description would simply refer to generalities, because he was so weak when I first saw him that I only considered the essential, such as the lungs, heart, etc. He was so sick I made no careful examination of non-essentials. His heart was good also his lungs, and he had no disease of the kidneys that I could find.

Q. Will you describe him for me as he left you, physically I mean?

A. Yes. A staid man, plethoric full, slow in all his movements; very deliberate in his speech.

Q. Now, putting the case out of your mind, and testifying as you are now, as an expert, what is the effect upon a brain that has been subjected to the operation that you have performed, if thereafter any part of the covering touches the brain—touches the membranes—what is the effect upon a patient?

A. Taking it that way, if the dura mater is removed, it was not so in that case, there would be adhesions between the scalp coverings and the lesser brain membranes.

162 Q. That has been known?

A. That must be the result.

Q. What is the effect of the adhesion?

A. These are exceedingly variable, inconstant. Many patients have adhesions and suffer no consequences; others seem to suffer from either headaches, neuralgia, possibly epileptic attacks and various cerebral diseases.

Q. Melancholia?

A. The mind may be so affected yes, but others are all variable, inconstant. You cannot say that they are necessary conclusions.

Q. Is melancholia one of the consequences?

A. Not necessarily melancholia; you might have other instances; any form of insanity; melancholia is of the emotional type. Various types of insanity may result. You cannot say any special type is the result.

Q. You would say it would be a recurring symptom?

A. That would depend upon the type of insanity. Outside of this instance it is simply a question of the type of insanity that might result from the cerebral injury.

Q. Let us illustrate it this way; Suppose the case you have in hand—a case of the skull adhering to the brain—a suppositious case; a man would be normal at times and a maniac at others?

A. Not necessarily; he might be a maniac and he might be affected with melancholia.

Q. A harmless person except when aroused?
A. Yes.
Q. He could go along with that condition of his head and be a normal person, and yet show his disease when aroused?
163 A. All that is possible, just like any other insanity.
Q. Now, doctor, take a case and disassociate yourself from your connection with this man; take the case of a man who having had an injury of that kind in the course of time develops an adhesion of the scalp to the brain—that is a surgical possibility is it not?
A. Yes.
Q. The result would be variable?
A. Yes.
Q. He might become insane in various attitudes; he might suffer with melancholia; he might suffer with epilepsy, take that form or any of the various forms indicating cerebral disturbances?
A. Yes.
Q. He might go on his normal course, his disturbances of the brain being occasioned by bad news or good news. For instance, by being thwarted in some pet plan, or in some pleasure—is that true?
A. If he were truly insane he would not be affected so much by news that would arouse the emotions of well people.
Q. If he were truly insane?
A. Yes. That is what we are referring to; that is insanity we are talking about. There is no special insanity attached to this kind of lesion. Any type might come on. That I wish again to qualify by stating that insanity is not the common consequences of adhesion.
Q. What is it?
A. More commonly epilepsy.
Q. I have found among the members of your profession a distaste to the use of the word insanity. You know there are conditions of cerebral injury that result in lesions of the brain which are not classified as insanity?
164 A. Yes.
Q. The man had recurring spells of insanity?
A. That is periodical insanity; still it is insanity.
Q. Let us agree upon the name?
A. Well, whatever the cause may be that provokes it, it is insanity, whether it be periodical or continuous.
Q. Let's you and I get back to our basis which we wandered from. A man after an injury which makes it possible for the scalp to adhere to the brain, is subject to insanity is he not?
A. He is liable, but I do not mean he is particularly liable. He is not particularly liable.
Q. He would not be considered as cerebrally sound?
A. He would not be a normal individual, but not necessarily defective mentally.
Q. What I want to get at is this: a man who has his scalp adhering to his brain, what would you call him?

A. I would call him not a normal individual, but one who had an indimical defect?

Q. And the adhesion of the scalp to the brain would not affect his health in any way?

A. Not necessarily.

Q. Well, we have been talking for nothing. Why does nature take all these pains to protect the brain, if it is perfectly unnecessary to have the covering?

A. Nature tries to protect against violence, and when the individual of this kind is exposed to violence, it protects us against violence. The brain could be exposed without any harm if it were not exposed to violence.

Q. What would you call violence?

A. Not direct or indirect injury to it.

165 Q. Would shock be any one of those things?

A. What do you mean by shock?

Q. Disturbances in the atmosphere?

A. Not unless it were a storm; but I mean ordinary atmospheric conditions would not influence that at all. Speaking only of the facts, the facts are that an ordinary individual may have a large hole in the skull, as long as the soft parts are protected, there need not be any disturbance in the contents.

Q. I fear you won't get away from the case you operated on and the one I put to you. Do you mean to say that a man who has an injury of the skull which leaves him in the condition that is scalp is adhering to the brain, that that man is in the same normal condition that you and I are?

A. He may be as normal as before the injury occurred.

Q. You use the words may be; he ought to be, ought he not?

A. Not necessarily; he has suffered an injury.

Q. Is he not suffering an injury daily when his scalp is adhering to his brain?

A. He may adjust himself to that condition with perfect ease.

Q. Then in such a case there is something abnormal to which the man has to adjust himself.

A. It is; it is the indimical defect of which I spoke.

Redirect examination by Mr. RICE:

Q. A few questions, doctor. Was Burbank's a case where there was an adhesion of the brain to the covering—if that is not too broad a question?

A. In this instance the main membrane, the dura, was not cut out; it was sewed up. Adhesions may occur along any kind of

166 line of any opening made to expose the brain. There was no adhesion between the scalp and the brain proper at all.

Q. Now the pus which you drained I understand was between the outer covering of the brain and the skull?

A. It was between the membrane and the brain itself, not inside the brain.

Q. So that in draining it, the membrane was not disturbed. The brain itself was not opened, not disturbed?

A. Yes.

Q. When you saw Burbank, say in February 1909, and previous to that, did those jerkings you spoke of still continue?

A. He did not complain of those at all when I last saw him.

Q. So that that symptom seemed to have abated?

A. Seemed to have abated. I do not know what could have happened subsequently; I only know up to the time I saw him.

Q. The obstruction you spoke of as causing the flow of this pus into the space between the covering of the brain and the skull, I say that obstruction was where?

A. In the nose.

Q. Then the pus should have escaped?

A. Not in the brain, the pus in the frontal sinus. It did not escape through the nose as it should normally; there was no discharge there.

Q. My friend Mr. Dart suggested to you many forms of insanity that might develop in the case of a person whose brain had adhered to its outer membranes or coverings; tell us whether Mr. Burbank exhibited any signs of insanity?

A. He was perfectly rational when I saw him last.

167 By Mr. DART:

Q. You understood that my question referred to a subsequent period of time?

A. Yes I understood that; up to the time I saw him last he was perfectly rational.

Q. Could adhesions have taken place subsequently without your knowing it?

A. Of course it was possible even at the time the operation took place.

Q. Development goes on in all cases?

A. Yes.

Q. You know nothing of an operation after you saw him in February, 1909?

A. If the adhesions were going to form they would have formed right after the operation.

Q. Another question; if an operation had been performed on the frontal sinus, that might have caused injury which would have injured the brain?

A. He might then have developed other insanity. It would have been a remarkable thing; it would have been possible.

Q. What would have been remarkable.

A. I mean the kind of operation that would have been performed. It would have been an extraordinary operation to have caused cerebral damage—damage to the brain.

Q. The removal of the sinus would not have done it?

A. No.

Q. It would have weakened the organ, the brain?

A. No, because it would not come into contact with it. The

simple opening of the sinus itself would not have injured the brain—I mean under normal circumstances, properly performed.

168 Q. But if the condition that you cured once had returned to the patient, he is liable to have the same injury that you treated once, is not he? If Mr. Burbank had had trouble with his nose again, if he had had trouble with his frontal sinus again, the cure that you made of the original trouble would not have prevented a repitition of the same trouble?

A. Of course not. There are of course changes that would have occurred, but it does not affect your question. The operation would have given him a safeguard against a repitition of the same thing in as grave form as it occurred the first time.

Q. It would have its effect on him?

A. It could have occurred.

Q. It would have had an effect grave or otherwise?

A. Yes. At the same time I again wish to state that as long as there was a free discharge from the sinus, that repitition was not likely to occur.

Q. But, doctor, you did not touch the sinus?

A. No; but he had no complaint at all on that score during the time I saw him.

Q. You drained the abscess——

A. I naturally knew of his not complaining of it, or any symptons of the sinus itself.

Q. You could not even prophesy what might have occurred in that direction afterwards?

A. No, I could not prophecy.

Q. If the man had gone under a surgical operation for that nose or sinus—would that not be an indication that it had returned, the mere fact that he had an operation?

A. Not necessarily.

169 *Agreement.*

It is hereby agreed that the signature of the witness to these notes and to the testimony when extended will be waived.

Endorsed on back: No. 93752. Civil District Court. Succession of T. Scott Burbank. Duplicate Testimony of R. B. Montgomery et al. Pr. M. & Mrs. Woodson, Executors, personally etc. Filed November 5th, 1910. (Sig.) Joe Garidel, d'y cl'k.

Civil District Court, Parish of Orleans, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Testimony and Notes of Evidence Taken in Open Court on the Trial Before the Honorable E. K. Skinner, Judge Presiding on Wednesday, October 26th, 1910.

Present:

Messrs. Rice & Montgomery and A. E. Billings, for the Executor;
Hy. P. Dart, Sr., Esq. for Messrs. Dart, Kernan & Dart, for Mrs. Josephine Ernst, Natural Tutrix;
J. Zach Spearing, Esq., for Mr. and Mrs. William R. Dodge.

On application of the Executors to be recognized; on petition to annul will, and on application for a writ of habeas corpus.

170 *Index.*

Richard B. Montgomery..... 6;
A. E. Billings..... 7;
Mrs. Lulu Westbrook..... 25;
Mrs. Julia Bourgeois..... 30;

By Mr. SPEARING: Counsel for Mrs. Nellie G. Burbank, wife of William R. Dodge, and her husband to authorize her, states to the Court that the citation and copy of the petition in this matter was served on the said parties only last evening and counsel has not had an opportunity of preparing an answer to be filed at this time, but counsel makes no objection to going into the trial at this time, reserving his rights to file his answer in a day or two before the end of the present week.

By Mr. DART: This will be agreeable to me, if it is to be an answer and not an exception.

By Mr. RICE: It shall be filed nunc pro tunc after, and you make your appearance for the defendants, your clients in this case at the trial to-day.

By Mr. SPEARING: I make my appearance for Mrs. Dodge and her husband in this suit, in answer to the citation and petition served upon them.

By Mr. RICE: I ask the Court for information as to what is to be tried to-day; there are three matters before the Court; the first is an application for recognition of the Executors appointed in the State of Texas, and their recognition by the Court of the County of Bell as such executors, and duly qualified, as shown by the record which is filed in this suit. The second is an application for a writ of habeas corpus, filed by Mrs. Josephine Ernst, as
171 legal tutrix of the minor Mary Springer Burbank. The third and last filed being a petition to set aside and annul the will

of the deceased, T. Scott Burbank; and I should like to know from my friends what matters are open for trial to-day.

By Mr. DART: I understood at the last calling of this case that these matters were all taken up as a consolidated case and they were to be tried in the future together as they had been tried in the past, and I suggest that in the orderly administration of the case that that should be the case. It is conceded on the part of Mr. Rice's clients, to have the will, and his authority under the will, recognized here. I followed that in a direct action to annul the will, citing all of the parties in interest, making them co-defendants, and before you is a petition on his part to present the will, my attack upon it in answer, and then a direct attack upon the will. The only matter now open, as I understand it, is the habeas corpus. As your Honor has already ruled as to whether or not the tutrix can have control of the child, and that will have to go in with the question whether or not the Texas will is good or bad, and whether we shall have the custody of the child, it strikes me your Honor should go right on with the entire case.

By Mr. RICE: I think the next day following the filing of this petition to annul the will, two other matters were set for hearing, so I understood. When the matter was called my friend suggested the filing of the petition to annul the will, and your Honor seemed to consider that being the case, there was nothing before the Court, and I contended strongly against that at the time; but, however,
there was an entry in the minutes of the Court simply con-
172 tinuing the proceedings until the 18th of October, and, of course, it went over until to-day. I will state to the Court that a hardship might occur in the disposition of the application for the writ of habeas corpus and for the recognition of the executors appointed by the Court and qualified in the State of Texas. They stand now simply as applicants to be recognized as such executors, and for registry of the will. Suppose your Honor should decide in favor of petitioners and nullify the will, and also decide against the petitioners in their application for recognition as executors, your Honor will see at once, upon an appeal taken from that, what the result will be. Those executors are here upon their right to be recognized and for the registry of the will and proceeding as executors; by such a judgment on the petition of the defendants, should they appeal, they will still be left without authority to act as executors. This estate is likely to suffer from neglect. As a fact, I know it has; over $100,000.00, composed mostly of real estate, and that real real estate is likely to suffer from neglect. As a fact, I know it has; I know there has been a depression of property in the city of New Orleans, in the residential portion of it, pending these proceedings—as all of that is likely to occur and there is no way to prevent it, unless there should be a judgment upon that application before this proceeding is tried.

By the COURT: I see no objection to trying the whole matter at once, and if there are no particular objections I will order it that way, so that if there is an appeal the whole case will go up at one time; we will hear it all at once and decide it all at once, so it will

all go to the Supreme Court in one transcript, and not by taking two bites at the cherry.

173 By Mr. RICE: Counsel for Mr. and Mrs. Woodson, defendants in the habeas corpus proceedings and applicants for recognition as executors in the probate proceedings had in the Court of Texas, on filing this suit, they beg to be considered and made part of the exception, in case of an appeal;

The commission issued to take the testimony of Mr. and Mrs. De Silva, in Rock Island, Illinois, which deposition has disappeared. It was in the old building. I have hunted for it repeatedly since last Friday and have not been able to find it, and I understand that you, Mr. Dart, have a copy of the deposition and also the letter attached.

By Mr. DART: I say in answer that I have never seen the original deposition or the original letter, but after the deposition arrived and was opened, I had a copy made for myself. I have that copy, and you are perfectly welcome to it if you want it.

By Mr. RICE: Have you any objection to introducing secondary testimony, under the circumstances?

By Mr. DART: No, sir; none at all.

By Mr. RICE: Reserving the right to offer rebutting evidence in case the direct evidence is offered on behalf of Mrs. Josephine Ernst, legal tutrix, on the question of the validity of the will, counsel for Mr. and Mrs. Woodson, in their application to be recognized as executors under the last will of the deceased and upon the defendants' own application for a writ of habeas corpus, as well as on the defendants' to the proceeding by Mrs. Josephine Ernst, legal tutrix, etc., on her petition to nullify the will of the deceased, counsel for the plaintiff in the first of said proceedings, now defendant in the second and third therein, offers in evidence the testimony of Dr. James M. Woodson and Dr. J. M. Woodson, recalled,

174 taken in open Court herein on June 28th, 1910, and the testimony of Dr. Joseph De Silva, Mamie De Silva and Mrs. Anna Woodson, with the offerings made at each of said hearings and mentioned in said testimony, the last of said testimony being taken before Jefferson C. Wenck, Notary Public.

It appearing that the commission directed to any Notary Public in and for the County of Rock Island, State of Illinois, to take the testimony of Joseph De Silva and Mamie A. De Silva, his wife, having been executed and returned to the Court and having been mislaid or lost, it is consented that secondary or oral evidence be admitted in lieu and place thereof, including the interrogatories propounded and answers thereto of the respective witnesses, the letter to the interrogatories annexed, and the envelope purporting to be identified in said depositions by said witnesses, the same to stand in place and lieu of the original commission, the interrogatories and answers thereto and said letter and certificate annexed.

By Mr. DART: Which is all consented to.

By Mr. SPEARING: I also consent on the part of my client.

RICHARD B. MONGOMERY, who being first duly sworn by the Court as a witness, deposes and says:

Direct examination.

By Mr. RICE:

Q. Mr. Montgomery, you are one of the members of the firm of Rice & Montgomery?
A. Yes, sir.
Q. Of counsel in this case?
A. Yes, sir.
Q. Are you aware of the fact whether or not a certain letter, purporting to be signed by T. Scott Burbank, dated say March 4th, 1910, was annexed to a deposition and interrogatories and a
175 commission, sent to Rock Island, Illinois, for the purpose of taking the testimony of Mr. and Mrs. De Silva?
A. I know that a commission was sent to take their testimony; that they notified the office by telegraph that the letter was not in their possession; that I telegraphed to Mr. Rice, who was absent from the city at the time, and he said that he thought it was in their possession, but if not it was in the office. I looked through the safe and found the letter and I sent the letter to them, but at the same time, in case it was lost, I made a copy of the same, and I have that copy in my possession. (Witness produces copy). I made a copy in my own hand-writing, and across the back of it, gave the date and wrote my name, so that I could be sure that it was a copy made at the time.
Q. It is a correct copy?
A. Yes, sir.

By Mr. RICE: A copy together with the endorsement referred to by the witness, is now offered in evidence.

By Mr. RICE:

Q. Mr. Montgomery, you say you sent that to Dr. De Silva?
A. Yes, sir; and he acknowledged receipt of it.
Q. Did you see the commission after it was returned?
A. No, sir; I didn't see the commission after it was returned.
Q. But you saw the letter?
A. Yes sir.

By Mr. RICE: Mr. Dart, are you willing to admit that the copy of the letter is a true and correct copy of the letter annexed?
By Mr. DART: I am not questioning anything that Mr. Montgomery testifies to.
176 By Mr. RICE: The copy which has been identified by Mr. Montgomery is a true copy of the original. It was attached to the depositions which were received and on file in the Clerk's office. I had the letter in my possession for some time, and I also read it again here, when I read and examined the depositions. I will add that Judge Alfred E. Billings was cognizant of the fact having seen such letter, it having been shown to him by me.

Judge ALFRED E. BILLINGS, who being first duly sworn, as a witness, by the Court, deposes and says:

Direct examination.

By Mr. RICE:

Q. Judge Billings, state whether or not you know the signature of T. Scott Burbank?
A. I do.
Q. Do you remember the letter that is referred to in the testimony of Mr. Montgomery as well as the statement which I myself just made?
A. I do.
Q. By whom was that signed, Judge?
A. By T. Scott Burbank.
Q. You know his signature?
A. Yes, sir; I have seen him write, probably, fifty, sixty or seventy times.
Q. How long did you know T. Scott Burbank, before he died?
A. Well, I have known him ever since he was a boy, probably forty years.
Q. About how old was he when he died?
177 A. I don't know his exact age, but he was not far from fifty. I think I may be mistaken; he was probably forty-eight or forty-nine.
Q. His father had his office with you?
A. Yes, sir; we had an office together for over thirty years.
Q. He had a desk in the office?
A. Yes sir.
Q. Conducted his business there?
A. Yes, sir.
Q. Do you know what T. Scott Burbank's business or employment for say fifteen or twenty years prior to this trouble and operation on his head, that is mentioned in the testimony of Dr. Matas and others, was?
A. Yes, sir.
Q. What was it?
A. I know what his employment was.
Q. Well, what was it, Judge?
A. For fifteen years, prior, I judge—I won't say twenty—he was manager of his father's plantation, in the parish of Assumption.
Q. Where did he live during that time?
A. He lived in the parish of Assumption, about five miles from Donaldsonville, on Bayou Lafourche.
Q. On the plantation?
A. Yes sir.
Q. Did you see him there?
A. Yes sir.
Q. Did he have any home or domicile in the Parish of Orleans during that time?
A. Not to my knowledge.

Q. You would have known it if he had, would you not?

178 A. Yes, sir.

Q. What proportion of his time did he spend in the Parish of Orleans during that period?

A. Well he made frequent visits to his father, I would say in the last ten years, sometimes it would be two or three months' interval between those visits, and sometimes oftener.

Q. So far as you know, Judge Billings, what was the purpose and object of these visits?

A. To consult with his father in regard to the management of the plantation. At any rate, that is what usually happened when he made the visits.

Q. So far as you know, where did those interviews or consultations take place?

A. In our office.

Q. Were you yourself present?

A. Oftentimes.

Q. Up to the time when he came to New Orleans for treatment, had he any business, or, so far as you know, own any property in the Parish of Orleans?

A. No, sir; not as far as I know.

Q. Do you know about what date he came to New Orleans for treatment?

A. Well, he was operated on, I was told yesterday by Dr. Matas, on the 1st of March, 1908, and for several months prior to that time he came down frequently for treatment by some nose specialist; I can't recall the name; I could tell it if I heard it.

Q. Not Dr. Matas?

A. No, sir; I think it was Dr. Joachim's partner.

179 Q. Did he remain in the city?

A. For a day or so at a time.

Q. Did you see him during those visits?

A. I don't think that Scott ever came to the city without coming to the office.

Q. He was in the office seeing his father?

A. Yes, sir.

Q. Respecting what business matters, if you know?

A. Respecting the plantation. I didn't pay particular attention to the conversations, but it was in regard to plantation matters.

Q. After the operation upon his head by Dr. Matas, how long did he remain in the city, or when did he leave?

A. I should judge some time in the month of June, 1908.

Q. Where did he go?

A. To Rock Island, Illinois.

Q. When did he return, Judge?

A. Well, I am not positive, but I think in November.

Q. Of the same year?

A. Yes, sir; November.

Q. He remained here until his father's death?

A. Yes, sir, he did.

Q. When did that occur?

A. That occurred in the month of December, 1908; the early part, I think.

Q. The early part?

A. Yes, sir; I think it was the early part.

Q. Is it not a fact it was December 23rd?

A. Was it: I don't remember?

Q. He was here at the time of his father's death?

A. Yes, sir; he was.

180 Q. He was in the office the day before his father died?

A. With his father, and they left the office together.

Q. On what mission?

A. They were talking about plantation affairs as usual.

Q. His father died very suddenly?

A. Yes, sir; he died the next morning, I understand, very suddenly.

Q. And after his father's death what did he do and where was he?

A. He remained in the city until, I think it was the 8th or 9th of April, 1909.

Q. He was one of the executors of his father's estate?

A. He was.

Q. Did you have any conferences with him during that time?

A. Yes, sir; many.

Q. Where?

A. At my office and at your office.

Q. Relative to what?

A. Relative to succession matters mostly—I am speaking now of the succession of his father.

Q. During this period, from the time when he first came to the city for treatment, in the winter of 1907-1908, what was his apparent mental condition?

A. Normal.

Q. Up to the time of his father's death, what was his condition?

A. Normal.

Q. Up to the time that he left, in April, 1909, what was his mental condition?

A. Normal.

Q. As I understand it, up to the very day before his father's death, he was in consultation with his father, in respect to the cultivation of the plantation?

181 Yes, sir; he was nearly every day.

Q. Please tell us whether there was anything to indicate at any time previous to his leaving the city of New Orleans, in April, 1909, that the condition of his mind was not normal and healthy?

A. No, sir; at no time, as far as I know.

Q. Do you remember whether or not you had any communication or consultation with him personally, prior to his father's death, immediately preceding or after the operation had been performed upon his head by Dr. Matas?

A. I talked with him probably, every time he came in the office.

Q. You were a friendly acquaintance?

A. Very friendly, and always had been.

Q. Can you remember any particular incident or instance tending to show what the condition of his mind was prior to his leaving the city of New Orleans ?

A. I don't know of but one, and that is I went with him to the office of Mr. Brian, a notary public, for the purpose of his making a will, which he made. After he had dictated his will to Mr. Brian, and before Mr. Brian had completed what was to be done to the will, Scott remarked to him "I wish you would read that over, so I can see if you have it as I wish to have it.' I don't recollect anything else.

Q. Did he display any eccentricities, oddities or freaks during this time after the operation upon his head by Dr. Matas?

A. Not to my knowledge.

Q. Did he show any tendency to mental aberration or depression?

A. No, sir; none whatever.

Q. Is there anything else you would like to state?

A. No, sir; except that his mind was perfectly clear at all times, as far as I ever knew.

182 Q. How many times do you suppose you met him after the operation was performed?

A. After the operation I didn't see him for six weeks or two months. It was several months' time after the operation was performed when he came to the office. When he returned from Rock Island, he was in the office almost every day, up to the time of his father's death.

Q. And after that?

A. After the succession was opened he was in my office almost every day, until he left in April.

Q. Do you know of any incident or declaration of his as to his purpose for leaving the city in April, 1909?

By Mr. DART: To the conversation between the witness and his client I plead privilege, and ask that it be excluded, on the ground that Mr. Billings was his personal lawyer and in consultation daily from the moment of his father's death to the time of the making of his will.

By Mr. RICE:

Q. Was the information you got given to you professionally?

A. I can't say that it was; I don't think it had anything to do with my professional duties towards him in any manner, shape or form.

By the COURT: Let the objection go to the effect.

By Mr. RICE:

Q. Do you know of any incident or declaration of his as to his purpose in leaving the city in April, 1909?

A. I know that he sent all of his property that he had up there he had some property in the Parish of Assumption, which he brought down and shipped to Rock Island, Illinois; his bank box, containing some bonds which he had, and other valuables;

and he said that he didn't intend to return to New Orleans
183 unless it was necessary for him in the settlement of the succession of his father; he intended to make that his home, where his daughter was and had been for some months.

Q. By his daughter you mean the minor, Mary Springer Burbank?

A. Yes, sir.

Q. Is there anything further you wish to state?

A. No, sir.

Q. Is there anything else?

A. I wrote several letters to Mrs. Josephine Ernst for Mr. Burbank, for the purpose of getting some property which he said she had belonging to him, and which he wished to take or send to Rock Island, Illinois. Some of it he got and some of it he didn't get. I wrote several letters to Mrs. Ernst, I think at Bay St. Louis, with a view of getting that property for him, for the purpose of sending it to him. Some was produced and some wasn't; for instance some wedding presents which belonged to him and his wife.

By Mr. DART:

Q. Don't you think the letters would be the best evidence? I would like to see your letters and her letters on the subject?

A. You can't see mine; I haven't got them.

By Mr. DART: If your Honor please, I would like to interpose an objection to all of this evidence?

By the COURT: You will have to produce the letters.

A. I will state that I haven't the letters which Mrs. Ernst sent, but those letters were delivered to Mr. Burbank.

By Mr. DART:

Q. But you have press copies of the letters you sent?

A. No; I kept no press copies. I am speaking of the letters which Mrs. Ernst wrote me; I gave them to Mr. Scott Burbank.

184 Q. Where are they?

A. I don't know what he did with them.

Q. They are not lost that you know of?

A. I don't know anything about them.

Q. You never made any search for them?

A. It wouldn't harm you any.

By Mr. DART: I want to keep the record as clear as I can of extraneous and irrelevant matter. I think that is purely irrelevant.

By Mr. RICE:

Q. Mr. Billings, in his method of speech how was Mr. Scott Burbank; was he a rapid talker?

A. No, Mr. Burbank was never a rapid talker; he was very slow in his speech.

Q. How was he as to the quantity?

A. He was not a great talker; rather reserved always.

Cross-examination.

By Mr. DART:

Q. And he was not a man that sought acquaintances or made friends abroad?

A. Well, I don't know what he did abroad.

Q. Well, about the other part of the question; he was not a man that sought acquaintances?

A. I can't say that he was; I never went around town with him much; very little if any.

Q. Was he a man that made intimacies with other people, in your judgment?

A. I should say he had very few intimates.

Q. Do you know of any he had?

A. Yes, sir.

Q. With whom?

A. His father-in-law, Mr. Felix Ernst. He was very intimate with him. I don't think he ever came to the city without seeing him.

Q. Won't you go further and say, as the result of your thirty years' acquaintance with him, that he belonged to the silent and reserved type of man?

A. He was reserved in his speech. I told you so.

Q. He was unusually so, wasn't he?

A. I can't say unusually; probably he was more so than most people.

Q. He was rather of the taciturn type, reserved, not talkative and not friendly?

A. He was always friendly with me.

Q. But with others?

A. He was always friendly to every one he knew, but he was never very talkative at any time.

Q. Well, now, in the course of your business experience with him, was it his habit to discuss his business with outside people?

A. I never had any business experience with him until after his father died.

Q. In regard to that matter?

A. I don't think he discussed it outside except with his sister.

Q. He was in charge of a large plantation and he must have had a large amount of business discussions there?

A. Yes, sir.

Q. In other words, you would call him a good business man, who kept his mouth closed on his own affairs?

A. Yes, sir; he was a duplicate of his father in that regard.

Q. And, on the contrary, they were both this kind of man, were they not; if you asked Mr. Burbank a question the chances are he would rather answer with a question than to answer your question?

A. I can't say that.

Q. Well, that was his father's characteristic?

A. He always answered me.

Q. But the outside world, not you?

A. Possibly if he was asked some question he didn't want to answer, you would find that out very quick. They talked very little of their private affairs, that I know.

Q. Where did Scott Burbank live when he came to New Orleans?

A. At his father's.

Q. That is rather a handsome house on St. Charles Ave.?

A. I never thought it was very handsome.

Q. I guess, Judge, your eyes are growing very dim from old age?

A. They are as good as they always were. I never thought the house very handsome, either in color or otherwise.

Q. They lived in that large place, on the corner of St. Charles Ave., corner of Joseph Street?

A. Yes, sir.

Q. That was the home of his father and his mother?

A. Yes, sir.

Q. Wasn't that the headquarters of Scott Burbank whenever he came to New Orleans?

A. Yes, sir; as far as I know. He always stopped there.

Q. Wasn't there a room there that he always slept in?

A. I have been told so since his death.

Q. And wasn't it known as Scott's room?

A. Yes; so I hear.

Q. You say he moved certain things to Rock Island?

A. Yes, sir.

Q. Is it not true he didn't move those things until the plantation was sold?

A. I don't think he did until after the plantation was sold.

187 Q. Isn't it true he brought them to New Orleans before he sent them to Rock Island?

A. That is my impression; but whether they were brought here or not I don't know, because I didn't see them.

Q. You personally know of what they consisted?

A. I do not.

Q. Have you any idea?

A. Well, he had some furniture there; whether that was all sent I don't know—and he had some bedding and linen and pictures there.

Q. It has been testified to here by his partner that the value of everything would probably be $300.00; that wouldn't indicate a very large assortment of stuff, would it?

A. No, sir.

Q. Do you know of any real furniture?

A. No, sir; I know he said his belongings were sent to Rock Island. I had no object in sending them.

Q. You qualified him as executor, did you not?

A. Yes, sir.

Q. In New Orleans?

A. Yes, sir; I represented him in his qualification.

Q. You also became his agent and attorney in fact?

A. I did.

Q. Under a procuration?

A. Under a procuration; yes, sir.

Q. You filed that in Court here, did you not?
A. I think Mr. Rice filed it; it is filed in the Mortgage office; I am not sure whether it is in Court or not.
Q. I have seen it, and I thought it was here?
A. Very likely.
Q. Will you say whether or not he continued to serve as executor?
A. He continued to be executor.
Q. Have you produced certain papers which I asked you for?
188 A. Yes, sir; I have the checks covering the time you asked for.
Q. He continued to remain executor, after his father's death, during the whole period of his absence, did he not.
A. Yes, sir; until his death. I will state, as you asked me if he continued to act as executor, that he did; and with the exception of two or three checks, possibly four, which I signed as agent his agent, he signed all of the checks, that were drawn, for the purpose of paying the liabilities of the succession.
Q. In other words, he retained his share and part of the power and duty as executor in his own hands during this period?
A. Do you mean regardless of my agency?
Q. Yes?
A. That will require an explanation.
Q. In other words, as I understand it, you would advise him of what was going on?
A. Yes, sir.
Q. Although you had the power of attorney as his agent, he actually directed and controlled you; he didn't let you do anything without his knowledge or consent?
A. I say no, and I will explain: When that power of attorney was drawn a very important clause was omitted, which was to give me special power and authority to sign checks. I signed three or four and discovered and thought I didn't have ample authority, and for that reason I sent all checks to Rock Island, to have Scott Burbank and Mrs. De Silva sign them instead of myself, although the bank here continued to honor my checks, that I had signed, but I didn't want to assume that responsibility, and whatever checks that were to be signed, I forwarded them to him and Mrs. De Silva and
189 they were signed and returned. That is the only thing I remember that he did from the time that he left here.
Q. Who attended to the renting of the houses?
A. I did, as far as those executors were concerned, and Mr. Spearing, as far as Mrs. Dodge is concerned.
Q. And did you make reports to Mr. Burbank from that time on?
A. No, sir; I made them to Mrs. De Silva and he would see them.
Q. You sent it to one for the purpose of both?
A. Yes, sir.
Q. You don't mean to say you purposely abstained from advising your client as to what you were doing?
A. Oh, no, sir; I usually requested her and Scott to sign the checks and return them, and they always came back.

Q. I judge from what you said about the will, that that was a public will?

A. Yes, sir.

Q. Before Mr. Brian?

A. Yes, sir.

Q. Did Mr. Burbank consult you previously about it before he died?

A. Yes, sir.

Q. It was made under your observation?

A. Yes, sir; I will state that two wills were made; one before Mr. Brian and a short time after that Mr. Burbank wanted to make another, so as to enlarge the power. Under these wills he made Dr. De Silva the tutor of his child in Rock Island; and he told me he understood the Courts in Rock Island were very loath to allow large sums of money to be used by a tutor. Mr. De Silva had a child about the same age as Mr. Burbank's child, and he desired that such money that she needed to go traveling should be allowed her, and thought that the courts might be a little lenient—and you will find that in the second will, and that was the reason for making the second will.

Q. It is your judgment that Mr. Scott Burbank thoroughly understood all that he was doing when he made those wills?

A. Yes, sir; just as much as he ever did since I knew him.

Q. And that he made those wills with care?

A. Yes, sir.

Q. And he was in the same condition of mind when he drew that agency procuration to you?

A. Yes, sir; he was.

Q. He knew what he was about when he made the agency procuration?

A. Yes, sir; he did.

Q. You explained that to him?

A. Yes, sir; it was explained to him by Mr. Soule, who made it.

Q. You advised him about it?

A. Yes, sir; I advised him and Mrs. De Silva to leave their personal power of attorney, if they were going to leave the State.

Q. You explained that they couldn't leave the State temporarily without leaving a power of attorney?

A. Yes, sir.

Q. Were you present when these wills were dictated, Judge, do you remember?

A. Yes, sir; I was present.

Q. Now, I suppose you were consulted, as most of us lawyers are consulted, that the will was put in legal phraseology?

A. Yes, sir; I was consulted.

Q. You left him free to make his own declarations?

A. Yes, sir; he made his own declarations; I certainly didn't dictate anything to the Notary.

Q. In other words, you saw that the will was made in legal shape, and left him free to make his own will, and his will, as dictated, was in his own dictation?

A. Yes, sir; it is his own dictation.

By Mr. RICE:

Q. Who were the executors of Edward W. Burbank, under the will?

A. Mrs. Mamie E. De Silva, T. Scott Burbank and Mrs. Nellie G. Dodge.

Q. Two daughters and a son?

A. Yes, sir.

Q. They all qualified?

A. Yes, sir.

Q. All of them together?

A. Yes, sir.

Q. All qualified?

A. All qualified; yes, sir.

Q. All acted together?

A. Yes, sir.

Q. You mentioned there was a certain plantation in the Parish of Assumption, belonging to Edward W. Burbank, of which T. Scott Burbank was overseer; what became of that plantation?

A. It was sold subsequent to the death of Mr. Burbank; it was sold by the heirs.

Q. In the course of administration?

A. I can't say that it was sold in the course of administration, but it was sold while administration was pending.

Q. I mean during the period of administration.

A. Yes sir.

Q. Do you recollect about when that was?

A. I think it was about the 6th of March, 1909; I am not sure; wasn't it, Mr. Spearing?

By Mr. SPEARING: I don't remember the date.

192 A. To the best of my recollection it was the 6th of March, 1909.

By Mr. RICE:

Q. Well all of the heirs joined in that sale?

A. Yes, sir.

Q. Those three that you have mentioned were the children of Edward W. Burbank?

A. Yes, sir.

Q. Any other children?

A. Yes, sir; Mrs. Anna M. Woodson was the fourth.

Q. She lives where?

A. At Temple, Texas.

By Mr. RICE: I now offer in evidence the deposition of Dr. Rudolph Matas, taken on October 25, 1910, before Alexis Brian, Notary Public and commissioner, to be produced. I am not able, may it please the Court, to produce the testimony, which was taken under the rule, on the 24-hour notice, as it has not been transcribed.

I also offer in evidence the exemplified copy of the record of the County Court of Bell County, State of Texas, heretofore offered, as

shown on page 2 of the testimony and memorandum of testimony taken in open Court on June 28, 1910.

By Mr. DART: I understand, of course, that this is only offered as rem ipsam and not binding me to the things that are in it; otherwise I object to it, except to prove rem ipsam.

By the COURT: Let the evidence in, and we will determine its admissibility hereafter. The objection goes to the effect, and not to the admissibility of the document.

By Mr. RICE: Are you willing to let the copy that you have be used and a copy of your copy be made and stand in lieu of the original depositions of Mr. and Mrs. De Silva, which have been lost or mislaid?

193 By Mr. DART: Certainly.

By Mr. RICE: We offer in evidence a copy of the depositions of Mr. and Mrs. DeSilva, taken at Rock Island, Rock Island County, Illinois, under the commission herein before referred to, a copy of the copy thereof to be made, the copy itself to be returned to you, Mr. Dart, and the copy of the copy to stand in lieu of the original.

We also offer in evidence the rule to read evidence taken under the commission referred to, in Bell County, Texas; also offer in evidence the evidence taken thereunder and the order of Court thereon.

By Mr. DART: I object to the questions propounded under that deposition, on the ground that they are leading and suggestive; I object to the answers on the further ground that they are hearsay; and in regard to Mr. Banks' testimony, I object to it on privilege, he having been, according to his own testimony, the professional adviser of the deceased, T. Scott Burbank.

By the COURT: We had better let this evidence in, with the reservation that it will be argued on the day that the case is argued.

By Mr. RICE: He wants to object to the testimony of this party; I haven't offered that yet; I am only offering the rule to read the testimony.

By the COURT: The Court will reserve his rights and the objection can be argued on the day of argument.

By Mr. DART: That is satisfactory.

By Mr. RICE: We offer in evidence the deposition, including the commission directed to W. West Lemley, of the County of Bell, State of Texas, and by him executed, dated August 3rd, 1910, herein to take the testimony of W. E. Willis, and the taking of the

194 testimony of W. E. Willis, thereunder; also of W. S. Rowland, B. A. Hodges, J. M. Murphy, Sidney Israel, R. H. Henderson, Charles S. Cox, H. M. Brown, Enoch Barber, O. F. Goeber, O. C. Scott, N. C. Erskin, H. K. Black, Clara Willis, Charles M. Campbell, Charles Russell, William M. Woodson and W. S. Banks, together with the interrogatories propounded to the respective witnesses and the Notary's return thereon, together with the envelope of said Notary, purporting to inclose such testimony, and directed to the Clerk of the Civil District Court, Parish of Orleans, New Orleans, Louisiana, and by him endorsed as received "9-8-10."

By Mr. DART: I renew my objections already stated before, to the

depositions as now offered, and I presume your Honor makes the same ruling.

By the COURT: The Court makes the same ruling, and that is, your rights are reserved, and the objections will be argued on the day of argument.

By Mr. RICE: If anything has slipped my mind, upon reading the stenographer's report of this offer, and if my friend finds that he has left out anything in the record he, as well as myself, shall have the right to replace it.

By Mr. DART: That is satisfactory to me.

By Mr. RICE: We rest.

Civil District Court, Parish of Orleans, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Testimony and Notes of Evidence Taken in Open Court, on Behalf of Mrs. Josephine Ernst, Natural Tutrix, Before the Honor-
195 *able E. K. Skinner, Judge Presiding, on Wednesday, October 26th,* 1910.

Present:

Messrs. Rice & Montgomery and A. E. Billings, for the Executor.

Hy. P. Dart, Sr., of Messrs. Dart, Kernan and Dart for Mrs. Josephine Ernst, Natural Tutrix.

J. Zach Spearing, Esq. for Mr. and Mrs. William R. Dodge.

On application of the Executors to be recognized; on petition to annul will, and on application for a writ of habeas corpus.

Mrs. LULU WESTBROOK, who being first duly sworn, by the Court, as a witness on behalf of the natural tutrix, deposes and says:

Direct examination.

By Mr. DART:

Q. What relation are you to Mrs. Josephine Ernst?

A. A daughter.

Q. What relation are you to Mary Springer Burbank?

A. Her aunt.

Q. Do you know Mary?

A. I do.

Q. How long have you known her?

A. Since her birth.

Q. Can you tell me who raised the baby, Mary, from her birth, and up to what time was she thus raised?

A. Mary Springer Burbank was born at her grand-mother's home, that is my mother, Mrs. Felix Ernst, Jr.

Q. Where abouts?

A. 1314 Third street, New Orleans, she was born. What else did you ask Mr. Dart?

196 Q. I asked you how long did she remain with her grandmother?

A. Until the doctor finished with her mother and she could go back to the country—until the doctor saw fit.

Q. After the baby was born, and after the period of the mother's sickness had passed, the baby went back to the country, which was in Ascension Parish?

A. Yes, sir.

Q. Who went with the baby besides her mother?

A. The sick nurse, Mrs. Cain, I didn't go.

Q. When did the child come back into the possession of the grand-mother, your mother?

A. After the death of her mother.

Q. When did her mother die?

A. December 12th. I can't say what year.

Q. You don't recall the year?

A. No, sir.

Q. She was your sister?

A. Yes, sir: but I was with her when she died.

Q. How old was the baby?

A. The baby was three years old.

Q. What became of it?

A. She remained with mamma.

Q. For how long?

A. Until she was six years old.

Q. She was three years old when her mother died?

A. Yes, sir; three years; may be a few days over three years.

Q. Have you heard from Mary at all since she has been away from you?

A. Very seldom.

Q. You are married now?

A. Yes, sir; before I was married we did hear from her occasionally.

197 Q. Do you hear from her occasionally now?

A. No, sir.

Q. Does your mother hear from her?

A. Yes, sir.

Q. Do you know Mary Springer Burbank's handwriting?

A. I do.

Q. Will you glance at this postal card?

A. Yes, sir.

Q. Do you know whose handwriting that is?

A. Yes, sir; I do.

Q. Whose handwriting is it?

A. Mary's.

Q. By Mary you mean your niece, Mary Springer Burbank?

A. Yes, sir.

Q. Do you know when that postal card was received?

A. That was received in Ocean Springs.

Q. Through the mail?
A. Yes, sir; at Ocean Springs, and I brought it down myself.
Q. It has what post mark?
A. Belton, Texas.
Q. Did you receive that in due course of mail?
A. Yes, sir; that was delivered in Ocean Springs.

By Mr. DART: On behalf of the Tutrix I offer in evidence this postal card, marked "Mary 1".

By Mr. RICE: If your Honor please, I am perfectly willing for for every bit of relevant evidence that can be offered to go in, but I should like to know the object of the examination of this witness and the postal card which counsel has offered in evidence. There are simply two issues set up by the proceeding; one is to set aside the will, and they are the same two issues, substantially that have been brought up in the other proceedings before the Court—one is that Scott Burbank did not live in the State of Texas, and that
198 his residence was in the City of New Orleans; and the other is non compos. Now, this witness is examined as to this minor child, who is not mentioned in this proceeding, and a postal card is offered, which the child writes to her grand-mother, asking her to send her some pecans. I fail to see the relevancy, and, therefore, I make the objection to the testimony of the witness as being, so far, entirely, irrelevant to any issue raised here; and the document is also irrelevant.

By the COURT: For the present, let the objection go to the effect and not to the admissibility of the document.

By Mr. DART:

Q. What are the personal relations between the grand-mother and her daughter Mary?
A. How do you mean, Mr. Dart?
Q. What were their personal relations with each other when they were there?
A. The child was devoted to mother.
Q. What were your personal relations with the child?
A. I cared for her as though she was my own, until she left us.
Q. You are a married woman and a mother?
A. Yes, sir; I am married and have a child.
Q. Did Mary remember your baby when she was born?
A. She never saw it, but she does know Marion. That is my baby's name.
Q. She has written to you about Marion?
A. Yes, sir.
Q. Is it not true she writes to the baby?
A. Yes, sir.
Q. About little things, showing her affection?
A. Yes, sir; just a childish letter.
Q. The baby can't read or write?
A. No, sir.

Cross-examination.

By Mr. RIGG:

Q. How old was the child, Mary Springer Burbank, when you saw her last?

A. When I saw Mary last; let me see, she was ten years old. I saw her on the day I was married.

Q. Where was she?

A. On Bayou Lafourche, with her father.

Q. You were up there?

A. No, sir; I was married in Ocean Springs.

Q. I asked you when you last saw the minor Mary Burbank?

A. On the day I was married. She was at my wedding. She was with her grand-mother, Mrs. Burbank, on St. Charles street, for a couple of days.

Q. When was that?

A. That was on the 16th of October.

Q. What conversation did you have with her there?

A. Nothing at all; she just came over, and was awful glad to see us.

Q. Came over from where?

A. Came from New Orleans to Ocean Springs, on the 15th of October, and I was married on the 17th.

Q. By her grand-mother you mean whom?

A. She was staying with Mrs. Burbank, and I came over here for her.

Q. What year was that?

A. (Witness looks at her wedding ring): 1907.

Q. Previous to that how long had it been since you saw her?

A. I hadn't seen Mary for quite a while.

Q. How old was Mary when you saw her last, before that time?

A. I guess seven (7) years old; she must have been something around that.

Q. How old is she now?

A. Mary, she is thirteen (13) years old; nearly fourteen (14) she was thirteen on the 2nd of December.

Q. Then, she will be fourteen in December coming?

A. Yes, sir; this coming December.

By Mr. DART:

Q. Have you got the letter she wrote your little baby?

A. Yes, sir; I have.

Q. Where is it?

A. I think mother has it.

Q. There is no date to this letter?

A. No, sir; it was just a childish letter.

Q. Can you tell about what time Mary sent that letter to your baby? What month and year?

A. This year, a little before Easter.

Q. Of this year?

A. Yes, sir.

Q. Is this the letter?
A. Yes, sir.
Q. Marion is your little baby?
A. Yes, sir.
Q. This little child here, which is just learning to walk?
A. Yes, sir.
Q. And this letter is a letter from Mary Springer Burbank to the baby?
A. Yes, sir, to little Marion.

By Mr. DART: I now offer in evidence, on behalf of the Tutrix, this letter, marked "Mary 2."
By Mr. RICE: I make the same objection.
By the COURT: The Court makes the same ruling. Let the objection go to the effect, and not to the admissibility of the document.

201 By Mr. DART:

Q. You and your baby are living with your mother?
A. No, sir; I am living in Ocean Springs. I have my own home there.
Q. You and your husband and your baby live together?
A. Yes, sir.
Q. Near your mother's house?
A. No, sir; in the same town; not near her.

By Mr. RICE:

Q. Your mother is Mrs. Josephine Ernst?
A. Yes, sir.
Q. Where does she live.
A. She is partly with me and partly with the Doctor, my brother, at No. 911 State Street.
Q. What times does she reside in Ocean Springs?
A. She has no particular time; she goes to and fro whenever she feels like it.
Q. Where is she now?
A. Right here with Dr. Ernst, my brother, her son, at 911 State Street.
Q. How long has she been here?
A. Pretty near two weeks, mother has been here.

Mrs. JULIA BOURGEOIS, who being first duly sworn by the Court, as a witness on behalf of the tutrix, deposes and says:

Direct examination.

By Mr. DART:

Q. Where do you live, Mrs. Bourgeois?
A. At No. 1230 Seventh Street.
Q. You have lived in the City of New Orleans a long time?
202 A. All my life time.
Q. Your husband is living.
A. No, sir; I am a widow.

Q. Who was your husband?
A. Mr. Adolph Bourgeois.
Q. You own your own home on Seventh Street?
A. Yes, sir.
Q. How long have you known Mrs. Josephine Ernst?
A. All my life.
Q. Do you know her well enough to say what sort of woman she is?
A. She is a very lovable, genteel and refined lady.

By Mr. RICE: Nobody has attacked Mrs. Ernst's appointment; this is wholly irrelevant.

By Mr. DART: I want to show by this witness and by others to the same extent, that Mrs. Ernst, is a house-keeper, has raised a cultured family, and is perfectly competent to raise this minor child; and I want to show, in addition to being entitled to the custody of the child by law, that she is thoroughly able to take care of the child and raise it. The reason I do this is because something was stated on the previous occasion about Mr. Burbank not wanting Mrs. Ernst to have the custody of the child.

By Mr. RICE: There is no issue here in respect to Mrs. Ernst not being perfectly qualified to take care of the minor; no attack with respect to either of them has been made here.

By the COURT: Let the objection go to the effect. We had better have the whole thing before the Court.

By Mr. RICE: For the purpose of saving the expense in taking the testimony, considering, however, that this is wholly irrelevant and consuming the time of the Court and counsel, it is admitted
203 that Mrs. Josephine Ernst is competent to act as legal tutrix of the minor child, Mary Springer Burbank; that she is a lady who has raised her family respectably; that she is a cultured woman, has raised her own family respectably, and that she enjoys the respect of her friends and acquaintances, especially of this lady and others who are in Court; and this admission is made under the objection heretofore made, and for the sole purpose mentioned.

By Mr. DART: With that statement, I desire it put in the record, not anticipating the admission to be made by my friend on the other side, I have now in the court-room five ladies who are prepared to give testimony of the same character.

By Mr. RICE: That is admitted.

By Mr. DART: I offer in evidence the record of the succession of Edward W. Burbank, asking my friends on the other side to agree that, in case of an appeal, that the record now in the Supreme Court shall be used, instead of being recopied, the record being No. 88,241; and I offer particularly in this record the certified copy of the power of attorney to Judge A. E. Billings, with lease to supply a copy of the same, if, not found in the record. I don't find it now.

By the COURT: It is agreed that such parts of this record as are not in the transcript in the Supreme Court shall be copied in the transcript in the present case, or as a supplement to either transcript,

and with leave to either party to add anything out of this record that is needed by special copy.

By Mr. RICE: And in case of an appeal, nothing shall be copied except such parts as are necessary to issues raised in the three matters now before the Court.

204 By Mr. DART: I would like to reserve my rights to put in copies of those two wills, after I examine them, which was testified to by Judge Billings. I want to offer specially the inventory taken in the qualification of Mrs. Ernst; and it is understood that the whole record is offered by both sides, with the liberty of using any part of it without the necessity of a special offer, and in case of an appeal only such parts shall go to the Supreme Court which are really necessary. If I find anything documentary missing, I reserve my right to offer it.

NOTE.—Testimony closed; case continued until Monday, November 7, 1910, for argument.

(Endorsed on back:) No. 93752—Civil District Court—Division C.—Succession of T. Scott Burbank. Testimony and Notes of Evidence, taken on Oct. 26/10, For Mr. & Mrs. Woodson, Executors, personally, etc. Filed November 5th, 1910. (Signed) Joe. Garidel, D'y Cl'k.

Civil District Court, Parish of Orleans, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Note of Evidence, Taken in Open Court on Monday, November 7th, 1910, Before the Honorable E. K. Skinner, Judge, Presiding.

Present:

Messrs. Rice and Billings, for the Executors.
Messrs. Dart, Kernan & Dart, for Mrs. Josephine Ernst.

By Mr. RICE: On behalf of Mr. and Mrs. Woodson, in the various capacities in which they have been sued and are suing in this case, we offer in evidence exemplified copy of the proceedings had

205 for the appointment of a guardian for the estate of the minor, Mary Springer Burbank, being an amplified copy under the acts of Congress; these proceedings having been had in the Circuit Court of the County of Bell, State of Texas.

Also offer in evidence exemplified copy of proceedings had in said Court, in confirmation of that appointment.

By Mr. DART: If your Honor please, I object to these two offers, upon the ground that they are irrelevant and immaterial, and it is absolutely an attempt to graft an entirely new proceeding in the case.

By the COURT: The objection will go to the effect; the Court will pass upon it when the entire case is passed upon.

By Mr. RICE: To which ruling of the Court we reserve the right, if necessary, to except, and to make the documents part of our bill of exceptions. One of the issues made here is the domicile of this party; we have offered in evidence the will, which declares the residence of the deceased, the probate proceedings had thereunder, where the Court of Texas took jurisdiction, and before whom the proof of domicile was made. There is a habeas corpus issued also in this case, and all of this attempts to prove the act of domicile.

By Mr. DART: Under the reservation which we had, I now produce the procuration of T. Scott Burbank to Judge A. E. Billings, not findng a copy in the record, which I have supplied; and I also produce an agreement, dated March 20th, 1909, between E. P. Munson and T. Scott Burbank and others, on the question of domicile; and also press manifold copies of letters passed between Dart, Kernan & Dart and Charles S. Rice, on May 18th, 1910, and his original reply thereto.

(Endorsed on back:) No. 93752. Civil District Court, Div. C. Succession of T. Scott Burbank. Notes of Evidence, taken on November 7th, 1910, for Mr. & Mrs. Woodson, as Executors, personally, etc. Filed November 5th, 1910. (Sg.) Joe. Garidel, D'y Clerk.

206 Civil District Court for the Parish of Orleans.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

The State of Louisiana to W. S. Lemley, Notary Public in and for the County of Bell, Texas, State of Texas, or any other Notary in and for said County of Bell, State of Texas, Greeting:

Know ye that we reposing confidence in your prudence and fidelity, do, by these present- give unto you authority diligently to examine all witnesses whatever, as well on the part of the plaintiff as of the defendant, in a certain suit now pending in the Civil District Court for the Parish of Orleans, wherein application has been filed by James M. Woodson and his wife, Anna M. Burbank to be recognized as, respectively, executor, executrix, the last will and testament of said T. Scott Burbank, deceased; and petition has being filed by Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank to set aside the said will.

Therefore we desire you that at certain times and places, by you to be appointed for that purpose, you cause the said witnesses to come before you, that you then and there examine them apart upon their respective corporal oath, first taken before you upon the Holy Evangelists, that you reduce their examination to writing, and cause the witness to sign the same; and when you shall so have taken them, that you send the same, with this commission, closed up under your seal, to us in our Civil District Court, in the City of New Orleans, without delay.

07 Witness the Honorable E. K. Skinner, Judge of the said Court this third day of August in the year of our Lord one housand nine hundred and ten and the one hundred and 35th year f the Independence of the United States.

(Sg.) J. G. LYNCH,
Deputy Clerk.

Witnesses:
W. E. WILLIS.
DR. WM. M. WOODSON.
W. S. ROWLAND.
CHAS. M. CAMPBELL.
A. J. JARRALL.
DR. A. C. SCOTT.
DR. R. R. WHITE.
O. F. GOBER.
DR. SIDNEY ISRAEL.
REV. B. A. HODGES.
DR. J. M. MURPHY.
MISS MIRT McGILLIVERY.
MISS CLARA WILLIS.
CHAS. S. COX.
R. K. HENDERSON.
REV. J. E. GREEN.
H. K. BLACK.
N. C. ERSKINE.
H. N. McCELVEY, SR.
CATHERINE COON.
VERNIE MERRILL.
MISS ROBERTSON.
CHAS. RUSSELL.
H. M. BROWN.
ENOCK BARBER.
DR. S. S. HYER.
HON. W. S. BANKS.

Interrogatories Propounded to the Parties Mentioned in the Commission.

Civil District Court, Parish of Orleans.

No. 93752

SUCCESSION OF T. SCOTT BURBANK.

Interrogatories accompanying commission propounded to W. E. Willis, Dr. William M. Woodson, W. S. Rowland, Charles M. Campbell, A. J. Jarrall, Dr. A. C. Scott, Dr. R. R. White, Dr. O. F. Gober, Dr. Sidney Israel, Rev. B. A. Hodges, Dr. J. M. Murphy, Miss Mirt McGillivery, Miss Clara Willis, Chas. S. Cox, R. K. Henderson, Rev. J. E. Green, H. K. Black, N. C. Erskine, H. M. McCelvey, Sr., Catherine Coon, Vernie Merrill, Louis Robertson, Charles Russell,

H. M. Brown, Enoch Barber, Dr. R. S. Hyer, Walter S. Rowland, Hon. W. S. Banks witnesses on behalf of Dr. James M. Woodson, and his wife, Anna M. Burbank, in a proceeding tendered by them herein praying that they be recognized as, respectively, executor and executrix, and for registry of the last will and testament of said T. Scott Burbank, by virtue of said last will, and a probate of the same, in the County Court of the County of Bell, State of Texas, and their qualifications as such executors in the said proceedings, and the issuance therein of Letters Testamentary and on behalf of said Dr. J. M. Woodson, and his wife, Anna M. Burbank, personally, and as such executors, and of Memie E. Burbank, wife of Joseph De Silva made defendants in a certain proceeding filed herein by Widow Josephine Ernst, as legal tutrix of the minor, Mary
208 Springer Burbank, on the 27th day of June, 1910, praying among other things, for judgment decreeing the said last will of said deceased to be null, void, inoperative and of no force and effect; said interrogatories to be answered by said witnesses under oath, and their answers thereto be used as evidence on behalf of Dr. James M. Woodson and his wife, Anna M. Burbank, on their application, aforesaid, and of said Dr. James M. Woodson, and his wife, Anna M. Burbank, and Memie E. Burbank, wife of Dr. Joseph De Silva, on the trial of the proceeding of Mrs. Josephine Ernst, legal tutrix, filed herein June 27th, 1910, to set aside the said last will of said deceased, T. Scott Burbank.

General Interrogatories to All the Witnesses.

First Interrogatory. Please state your full name, your age, residence and your occupation, business or profession?

Second Interrogatory. State whether or not you knew personally T. Scott Burbank, named above, if you say yes, state when and where you first knew or became acquainted with him and how long that acquaintance continued?

The following interrogatories, numbered third, fourth and fifth are propounded to the witnesses for evidence upon the application of Dr. James M. Woodson and his wife, Anna M. Woodson, to be recognized, respectively, as executor and executrix, of the last will and testament of T. Scott Burbank, by virtue of said will and said exemplified copy of the proceeding, in probate of said will, the confirmation and qualification of the said executors and Letters Testamentary issued in the County Court of Bell County, State of Texas, and the opposition thereto filed by widow Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank.

209 Third Interrogatory. If you know, state where T. Scott Burbank was actually domiciled, from say the 10th of February, 1910, to the date of his death, say May 10th, 1910, give name of town or City, street therein and number; with whom, if any one, he resided.

Fourth Interrogatory. If you know anything respecting his, T. Scott Burbank's having made his permanent domicile in Texas; or of his having made verbal or written declaration as to his intention

to make or to have made or established, his permanent domicile in the State of Texas or in any place in the State of Texas, state what business, social or other relation you had with him between the 10th of February, 1910, and his death in May, 1910, and where; whether you conversed, and, if yea, how often, with him, in said interval, and what, if anything he said or did, during that interval, in your presence or in your hearing, relative to having made Texas, and especially the City of Temple, in said State, his permanent domicile?

Fifth Interrogatory. State as fully as if thereto specially questioned and other facts within your knowledge tending to show that said T. Scott Burbank, had, at any time or times, during the period above referred to, declared his intention to make or fact that he had already made and established his permanent domicile at Temple, or any other place, in the State of Texas. State as nearly as possible, when, where, and in whose presence and whether seldom or repeatedly he made such declaration of intention.

The following interrogatory numbered six is propounded to the witnesses upon the issues legally raised by the petition of said Mrs. Josephine Ernst, legal tutrix, etc., as aforesaid, filed herein June 27th, 1910, to set aside said last will:

210 Sixth Interrogatory. If as a fact you met socially, in business, or otherwise, said T. Scott Burbank, in the City of Temple, Texas, or elsewhere, between say February 10th, 1910, and May 10th, 1910, state where, when, and the circumstances of said meeting, state whether or not he was during said period and at the times you met him, as above, during said period mentally competent to make a valid last will and testament, and, especially, state whether or not he was mentally — to make such valid last will and testament on say the 22nd, day of March, 1910. State whether you have seen & read or heard read the original of said referred to last will on file in County Court in the County of Bell, State of Texas, and whether or not the testator therein T. Scott Burbank, was in your opinion and belief mentally competent or capable at the date of its making, to so make it understandingly, to-wit; on say the 22nd, day of March, 1910. State fully, as if thereto specially questioned, the facts and experience on which the opinion expressed is expressed by you, and state whether such opinion is based as well upon your professional knowledge or experience, if you *or* a practical physician or surgeon; and as such physician or surgeon whether the surgical operation theretofore on the skull and brain of the testator affected during the time you knew him, the mental competency of said testator to make the last will referred to on the 22nd, day of March, 1910; and state whether or not it is true that at the date of making said last will, or before or thereafter, any illness and disease of the brain of the testator was in a critical or acute state, and whether his intellect and mental manifestations and powers were not, in your judgment, such as to render said testator mentally incompetent to make said will and understand the same.

(Sg.) RICE & MONTGOMERY,
A. E. BILLINGS,
Of Counsel.

211 THE STATE OF TEXAS,
County of Bell:

Be it known, that on the days and dates hereinafter written and pursuant to the commission, to which this is attached, issuing out of the Civil District Court of the Parish of Orleans, State of Louisiana, in the cause, pending therein, entitled Succession of T. Scott Burbank, numbered 93752 of the docket of said Court, directed to W. S. Lemley, Notary Public, or to any other Notary Public, duly commissioned and qualified, in and for the County of Bell, State of Texas, personally came and appeared before me, W. S. Lemley, the following named witnesses: W. E. Willis, W. S. Rowland, R. A. Hodges, Dr. J. M. Murphy, Dr. Sidney Israel, Charles S. Cox, R. K. Henderson, H. M. Brown, Enoch Barber, Dr. O. F. Gober, H. K. Black, H. C. Erskine, Dr. A. C. Scott, Miss Clara Willis, Dr. R. R. White, Charles M. Campbell, Dr. William M. Woodson, W. S. Banks, Charles Russell: who having been first duly sworn by me, to tell the truth, the whole truth and nothing but the truth, in answer to the interrogatories to said commission annexed, and now annexed to as part of these depositions and return therewith to said Civil District Court, did each for himself and herself answer thereto as follows:

Answers to Interrogatories.

To the First Interrogatory He Answers: My name is W. S. Rowland, I am forty four years old, reside in Temple Bell County, Texas, and am cashier of the City National Bank, a Banking institution in said City.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank during his residence in said City. I became acquainted with him shortly after he took up his residence here, and our acquaintance continued until the time of his death. My
212 first introduction to him was at the Bank, where I met him in a business way. When I say the Bank, I mean the Bank I have already testified about.

To the Third Interrogatory He Answers: T. Scott Burbank was actually domiciled between the dates inquired about in these interrogatories, in Temple, Bell County, Texas, and at that time resided with Dr. James M. Woodson, whose residence is located at the corner of Third Street and West Downs Ave.

To the Fourth Interrogatory He Answers: The deceased never told me of his intention to make or establish his permanent domicile in said City or any other place in the State of Texas, but through social and business relations I had with him, and through my knowledge, I had of his family affairs it was my understanding that he intended to make Temple, Texas, his permanent domicile. I had various conversations with him at said Bank, Dr. Woodson's residence, and other places. He made no statement to me of his intention to make Temple his permanent domicile, but from his acts and other ways I understood, he intended doing so.

To the Fifth Interrogatory He Answers: The facts within my knowledge and which I have reference to in my foregoing answers as tending to show said T. Scott Burbank, had during the period testified about made and established his permanent domicile are as follows: He commenced banking relations with said Bank as though he intended to become a regular customer; he moved his household effects to said city; and he placed his little girl as a student in Baylor College, at Belton, Texas, in this County.

213 To the Sixth Interrogatory He Answers: I met the deceased both in a business and social way between the dates especially inquired about at various times and places, and I now clearly remember meeting him several times, both at Dr. Woodson's residence and at said bank and on the streets a number of times, I saw him on the streets and spoke to him the day before his demise. At all times I saw him, or talked with him he impressed me as being fully capable and competent mentally to make a valid will and testament and I think he was mentally competent to make a valid will and testament on the date specially inquired about. I have never seen read or heard read, the will in question. I was a witness at his request to the execution of said instrument. I believe confidently that he was mentally competent and capable at the date of its making to understandingly make the same. I base my opinion on my general knowledge — and their mental capacity to transact business which as a Banker extended over twenty three years. I do not base my opinion on professional knowledge or experience and — in no sense qualified to testify as a physician or surgeon. At no time I saw him or conversed with him, or had business dealings with, between the dates first especially inquired about, did I think that he was in a critical or acute state mentally as a result of any previous injury he had sustained; and it is my unqualified opinion that his intellect and mental manifestations and powers at the time of his making and executing the will was such as to render him mentally competent to make said will and understand the same.

(Sg.) W. S. ROWLAND.

Sworn to and subscribed before me this 16th, day of August, 1910.

(Sg.) W. S. LEMLEY,
Notary Public, Bell County, Texas.

214 *Answers to Interrogatories.*

To the First Interrogatory He Answered: My name is W. E. Willis, I am about fifty years old. Reside at Temple, Bell County, Texas, and am there engaged in the drug business.

To the Second Interrogatory He Answers: I knew personally T. Scott Burbank, during his residence in Temple, Texas, meeting him soon after he came here in my Drug Store, the acquaintance continued until the time of his death.

To the Third Interrogatory He Answers: T. Scott Burbank was actually domiciled in Temple, Bell County, Texas, between the dates inquired about, in this interrogatory, and during that time he re-

sided with Dr. James M. Woodson, in said city. I don't know the number of his house but he lives at the corner of Down Avenue and Third Street.

To the Fourth Interrogatory He Answers: I know of T. Scott Burbank having made a declaration as to his intention to make and establish his permanent domicile in the State of Texas. I knew him both socially and in a business way, and had various conversations with him from the time of my introduction to him to the time of his death. On being introduced to him, he told me he had come here, Temple, Texas, to live. He came in the store this first time I speak of, with Dr. James M. Woodson, who introduced him to me and he made this statement in his presence and in his hearing.

To the Fifth Interrogatory He Answers and Says: I don't know anything outside of the declaration that I have testified about, tending to show that said T. Scott Burbank had made and established his permanent domicile at Temple, Texas.

To the Sixth Interrogatory He Answers and Says: As indicated in my foregoing answers, my relations with the deceased were
215 were both business and social. I had various and frequent talks with him socially and sold him drugs on several occasions. Most of my meeting being in my Drug Store. At all times I met him, from the time of my first introduction to him, until almost the day of his death, which times include the date specially inquired about in this interrogatory, I found him mentally competent to make a valid last will and testament, and I am of the opinion that he was mentally competent to make such a valid last will and testament on say the 22nd day of March, 1910. I found him to be a very quite and reserved gentlemen, but a most sensible and intelligent one. He was not talkative but carried on a thoroughly intelligent conversation, and I never suspected him of being incompetent to transact business matters, or discuss any subject that was under discussion in our conversation. I have not seen or read or heard read the last will and testament in question. But for reasons stated, and basing my opinion and belief further on observation of men, during a reasonably long life, I think he was mentally competent and capable at the date of its making to make it understandingly. I do not speak from professional knowledge or experience. I am not a physician or surgeon. Hence do not testify about the surgical operation inquired about. While not a physician or surgeon, I have been in the Drug business about thirty years, and have made it a habit of observing people, both as to their physical and mental condition, and at no time between the time of my introduction to the deceased, and the date of his death during which time I met him frequently and had numerous conversations with him, was he in my opinion, either physically or mentally in a critical or acute state, and I think his intellect and mental manifestations and powers were such as to warrant me in saying that he was mentally competent to make said will and understand the same.

(Sg.) W. E. WILLIS.

116 Sworn to and subscribed to before me this 16th, day of August, 1910.

(Sg.) W. S. LEMLEY,
Notary Public, Bell County, Texas.

Answers to Interrogatories.

To the First Interrogatory He Answers: My name is B. A. Hodges, I am forty one years, old, and reside at Temple, Texas. I am a Minister of the Gospel.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank during his residence at Temple, Texas. I met him soon after he came to Temple, Texas. And became a member of Dr. James M. Woodson's household. I don't remember exactly where I met him first. I continued to meet him from time to time until the day of his death, possibly meeting him once a week or oftener.

To the Third Interrogatory He Answers: He was domiciled between the dates inquired about in Temple, Bell County, Texas, and resided with Dr. James M. Woodson, on West Down Street in said City.

To the Fourth Interrogatory He Answers: I enjoyed a social acquaintance with the said T. Scott Burbank, during the time testified about, and my relations with him were purely social during that time. I had frequent conversations with him. Would meet him and talk about passing matters, that were of mutual interest to us. On one particular occasion I recall, I met him in Willis's Drug Store in said City and the substance of our conversation was as follows: I walked in and spoke to him, stating that I was glad to meet him and told him that I understood that he was to make his home in Temple, and he said that he was. I told him that I was glad, and asked him how he felt, he said very well. The substance of his statement was a positive declaration to the effect that
217 he intended to make Temple, Bell County, Texas, his permanent domicile. I conversed with him frequently at other times but I do not recall the particular subject just testified about coming up at any other time.

To the Fifth Interrogatory He Answers: As indicated in the latter part of my answer to the preceeding interrogatory, I never heard him at any time other than at the time particularly testified about make any declaration relative to his intention to establish his permanent domicile at said Temple or any other place in Texas.

To the Sixth Interrogatory He Answers: As already stated I met T. Scott Burbank socially in the City of Temple, Texas, from time to time once a week or more, possibly, between February 10th., 1910, and May 10th, 1909. I met him several times in the office of Dr. James M. Woodson, once or twice at Dr. James Woodson's residence, several times in the Drug Store already testified about, and passed him frequently several times at least, on the street, and while he was seated on the gallery of Dr. Woodson's residence. He

was never voluble in his speech, but I had not known of the injury he had sustained, and had I never seen his hat removed, I would never have known or suspected that there was anything at any time, wrong with him. He spoke intelligently and his demeanor and bearing was that of a man who was thoroughly at himself, mentally. He was pleasant in his greeting and always polite in his speech. He was thoroughly friendly, and, all things considered I would say that during the time testified about, that is the period particularly inquired about he was competent to make a valid last will and testament and was competent to make such will and testament on the date especially inquired about. I have never seen or read, or heard read, the will in question and know nothing whatever about its contents. I do not speak from professional knowledge or experi-
218 ence and my opinion expressed is based upon my acquaintance with, and observation of the deceased, and my general capacity to judge men and their mental ability. I am not as indicated in the foregoing answer, a physician or surgeon. Hence, I am not competent to testify as to what effect the operation on the skull and brain of the testator may have had on his mental capacity to make the will in question. Speaking from my observation of the deceased, and my acquaintance with him, I would say that during my acquaintance with him his brain was not in a critical or acute state. I might add that up to the very day of his death, I saw him, seeing him on the day of his death, seated on the porch at Dr. J. M. Woodson's residence, at which time in passing he greeted me in his usual friendly and polite manner, and I would say in my opinion, during all the times testified about, up to, and including the time last particularly mentioned, the mental state of the testator was such that he was not rendered mentally incompetent to make said will and understand the same.

(Sg.) B. A. HODGES.

Sworn to and subscribed before me this 16th day of August, 1910.

(Sg.) W. S. LEMLEY,
[SEAL.] *Notary Public, Bell County, Texas.*

Answers to Interrogatories.

To the First Interrogatory He Answers: My name is J. M. Murphy, I am thirty six years old, reside at Temple, Texas, and am a Dental Surgeon.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank during his last days. I met the deceased just a few days after he came to Temple, Texas, and I think I met him in the office of Dr. J. M. Woodson, for the first time. I was
219 quite intimately acquainted with — from that time until the day of his death.

To the Third Interrogatory He Answers: T. Scott Burbank was actually domiciled from the 10th, day of February, 1910 to the date

of his death in Temple, Bell County, Texas, and was a member of the household of Dr. James M. Woodson, who resides at the corner of Third Street and West Downs in said City.

To the Fourth Interrogatory He Answers: I enjoyed both social and business relations with the deceased, served him professionally, operated on him perhaps a half dozen times and had numerous conversations with him, and in one — his conversations, he made the statement to me, that he intended making said Temple, Texas, his home. I cannot approximate the number of times I talked with him, but during the dates particularly inquired about in these interrogatories, I had numerous conversations with him.

To the Fifth Interrogatory He Answers: The statement testified about is the only thing I know of tending to show intention of said T. Scott Burbank to make said Temple, Texas, his permanent domicile. My recollection is that the declaration of intention testified about was made in my office. I cannot now state, whether or not any one was present at the time he made said statement.

To the Sixth Interrogatory He Answers: Dr. James M. Woodson and I at that time officed in the same building, had adjoining offices and a joint reception room, and I saw and conversed with said T. Scott Burbank almost daily during the dates testified about. During the period in question and at all the times I met him and conversed with him, he was in my opinion mentally competent to make a valid last will and testament, and was mentally com-
220 petent to make such a valid last will and testament on the date especially inquired about. I have never seen, read or heard read, the will in question, and do not know what its provisions are. But I am of the opinion that he was qualified mentally during all the times testified about, to make a valid last will and testament understandingly. My conversations with him were not simply passing greetings, but as stated, I operated on him as a Dental Surgeon, and as he was in my care, a half dozen times *are* more, and for several minutes at a time, I had ample opportunities for conversing with him and sizing up his mental status. He was not a talkative man but carried on a fluent and intelligent conversation. Seemed to be thoroughly capable of understanding business matters. He was unusually polite and courteous and his conversation was characterized by a quit*e* pleasantness. I base my opinion as to his mental condition on my acquaintance with, conversation with him, and my general capacity to judge the human nature. I do not speak or testify from professional knowledge or experience. During the time testified about, so far as I know, and at none of the times that I saw the testator, which, as stated, was almost daily, was he in a critical or acute state mentally, and in my opinion and judgment, his intellect and mental manifestations and powers, during all of said times, were such as to render said testator, mentally competent to make said will and understand the same.

(Sg.) J. M. MURPHY.

Sworn to and subscribed before me this 16th day of August, 1910.

(Sg.) W. S. LEMLEY,

[SEAL.] *Notary Public, Bell County, Texas.*

221 *Answers to Interrogatories.*

To the First Interrogatory He Answers: My name is Sidney Israel. I am twenty four years old and reside at Temple, Texas, and am a practicing physician and surgeon.

To the Second Interrogatory He Answers: I first met T. Scott Burbank, while he lived in Temple, Texas, which was I think, some time in January of this year, and continued to be acquainted with — until the day of his death. I met him in the office of Dr. James M. Woodson for the first time.

To the Third Interrogatory He Answers: T. Scott Burbank was actually domiciled between the dates inquired about in Temple, Texas, and resided with Dr. James M. Woodson, who lived at the cornor of Downs Ave. and Third Streets.

To the Fourth Interrogatory He Answers: I do not know anything respecting his having made a declaration as to his intention to reside here, but in conversation he always spoke of this place, (Temple Texas) as his home. I met him during my acquaintance with him in a social way. I saw him no less than once a week, during our acquaintance, frequently much oftener, sometime daily for several days, at a time, conversing with him on nearly every occasion I met him, but never heard him make such a specific declaration as is inquired about in this interrogatory.

To the Fifth Interrogatory He Answers: I am unable to make any response to this interrogatory.

To the Sixth Interrogatory He Answers: I have in my foregoing answers testified that I met the deceased socially from time to time, between the dates inquired about. The office of James M. Woodson and my office are both on the same floor, and as we both exchange visits often I had occasion to meet him in Dr. Woodson's office frequently. Sometime I met him at other places in the City.

222 I remember meeting him at the Santa Fe Hospital, and also at the residence of Dr. Woodson. He was during the period inquired about mentally competent to make a valid last will and testament and was, say on the 22nd day of March, 1910, mentally competent to make such valid last will and testament. I never saw, read or heard read the will in question. But, in my opinion, and belief T. Scott Burbank was mentally competent at the date of its making to make it understandingly. While he was a man who was reserved and quite I found him to be a man of good common sense, qualified to transact business and intelligently discuss any subject that arose in our conversations. My opinion herein expressed is based not only on my observation or acquaintance with the deceased, but upon my professional knowledge and experience. I am a practicing physician and surgeon, and am a graduate of Tulane University in the State of Louisiana. I am at present House Surgeon of the Gulf Colorado and Sante Fe Hospital, at Temple, Texas. Not being familiar with the extent and nature of the operation performed on the skull and brain of the testator and the disease requiring such an operation, I am not in a position to give a positive opinion as to whether the surgical operation theretofore on the

skull and brain of the testator, materially affected during the time I knew him the mental competency of said testator to make a last will referred to on the 22nd day of March, 1910. But I will say that I had frequent opportunities for observing the testator, was interested in him professionally as well as personally, saw his hat frequently removed, observed the depression in his skull, had *he* tell me as thoroughly as he was able to do so, as a layman the history of his case, and the nature of the operation, and all things considered I am of the opinion that he was of sound mind and memory and was fully capable of making a valid last will and testament. He was not in a critical or acute state at any time I knew him, and was acquainted with him, and his intellect and mental
223 manifestations and powers were normal and in my judgment, such as to render him mentally competent to make said will and understand the same. For the reasons stated and because he was from Louisiana, my native State, and because he was operated on by one of my former professors, I was especially interested in the case, and observed the testator critically from time to time. I never observed or detected any symptoms of paralysis as a result of the operation, and in all of our conversation I found his memory to be excellent, I might say perfect.

(Sg.) SIDNEY ISRAEL, *M. D.*

Sworn to and subscribed before me this 17th day of August, 1910.

(Sg.) W. S. LEMLEY,
[SEAL.] *Notary Public, Bell County, Texas.*

Answers to Interrogatories.

To the First Interrogatory He Answers: My name is R. K. Henderson. I am about thirty eight years old, reside at Temple Bell County, Texas, and am in the employ of Mr. Chas. S. Cox, who is engaged in the Gents' Furnishing Business at said place.

To the Second Interrogatory He Answers: I knew T. Scott Burbank personally. I met him in the store of Chas. S. Cox, and waited on him about three weeks before his death. This business transa-tion was the extent of my acquaintance with him.

To the Third Interrogatory He Answers: Of my knowledge I am unable to make any response to this interrogatory.

224 To the Fourth He Answers: The extent of my relation with him has been indicated with him in my foregoing answers. It was limited to the business transaction I have testified about at which time I had a conversation lasting five minutes. There were other persons in the store at the time but I can't state positively who was present. I don't know about his having made such a declaration of intentions as herein inquired about.

To the Fifth Interrogatory He Answers: I am unable to make any response to this interrogatory.

To the Sixth Interrogatory He Answers: I met T. Scott Burbank in the City of Temple, Texas, about three weeks before his death in the store of Chas. S. Cox, at which time I sold him a hat. To the extent of my acquaintance with him, and speaking of the

time at which I met him, and transacted business with him, I would say that in my opinion he was competent to make a valid last will and testament.

He impressed me as being a man of good sense, quite demeanor, and as being competent to transact any ordinary business. I have not seen, read, or hear read the will in question. I am not a physician or surgeon, and am unable to testify with reference to such matters as are particularly addressed to witnesses of those professions. The intellect of the deceased and his mental powers, manifested at the time I have testified about lead me to the opinion that he was mentally competent at such time to make such will and understand the same.

(Sg.) R. K. HENDERSON.

Sworn to and subscribed before me this 17th day of August, 1910.

(Sg.) W. S. LEMLEY,
[SEAL.] *Notary Public, Bell County, Texas.*

225 *Answers to Interrogatories.*

To the First Interrogatory He Answers: My name is Charles S. Cox, I am thirty five years old, reside at Temple, Bell County, Texas, and am engaged in the Gents' furnishing business.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank, while he lived at Temple, Texas. I met him in my place of business several times. While he lived here. I met him shortly after he came to Temple, Texas.

To the Third Interrogatory He Answers: T. Scott Burbank, was actually domiciled in Temple, Bell County, Texas, during the time of my acquaintance with him, which included the period — time mentioned in this interrogatory, I saw him at Dr. James M. Woodson's residence a number of times, where he resided in said City. Dr. Woodson's residence is located at the corner of Third Street and West Down Ave., in said City just a short distance from my residence.

To the Fourth Interrogatory He Answers: I am unable to make any response to this interrogatory.

To the Fifth Interrogatory He Answers: I am unable to make any response to this interrogatory.

To the Sixth Interrogatory He Answers: I met him principally in a business way in my store. I found him a quite and reserved man, but thoroughly capable of transacting business, he knew exactly what he wanted, and whether it suited. I think he was capable mentally of making a last will and testament, during all the time of my acquaintance with —. I have not seen, read or heard read the will in question, but T. Scott Burbank was in my opinion and belief, mentally capable and competent at the time inquired about of making a will and making it understandingly. I base my
226 opinion purely on my association with him and observation of him. I am not a practicing physician or surgeon, and

make no response to that part of this interrogatory that is addressed to physicians and surgeons, with reference to surgical operation which had been performed on the skull. Speaking of his skull and the condition in which it was, I wish to say that I had seen him in the store, talked to him, and heard others talking to him several times, before I had any suspicion or knowledge of the fact that there was an indentation in his skull or that he had ever been operated on. And he always at such times impressed me as being thoroughly at himself and fully capable of understanding his business. I naturally observed him more closely after making the observation testified about, having seen him once or twice afterwards, and his intellect and mental manifestations and powers, were such in my judgment that I feel justified in saying that the deceased was mentally competent to make the will in question and understand the same.

(Sg.) CHAS. S. COX.

Sworn to and subscribed before me this 17th day of August, 1910.

(Sg.) W. S. LEMLEY,

[SEAL.] *Notary Public, Bell County, Texas.*

Answers to Interrogatories.

To the First Interrogatory He Answers: My name is H. M. Brown, I am thirty three years old, reside at Temple, Bell County, Texas, and am a Barber.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank while he lived at Temple, Texas. I became acquainted with him in the barber shop of Enoch Barber. My acquaintance with him was comparatively brief, I having shaved him several times in the early part of this year.

227 To the Third Interrogatory He Answers: Of my own knowledge, I cannot answer this third interrogatory. I only knew the deceased in the way I have stated above.

To the Fourth Interrogatory He Answers as Follows: I don't know of my own knowledge anything about the permanent domicile of T. Scott Burbank, and never heard him make such declaration as is inquired about in this interrogatory. I knew him in a business way having shaved him several — while he lived in Temple in the early part of this year. I had conversations with him at such times. I suppose I shaved — a half dozen times in all.

To the Fifth Interrogatory He Answers: Of my own knowledge I am unable to make any response to this interrogatory.

To the Sixth Interrogatory He Answers: In my foregoing answers I have stated when, where and in what way I met T. Scott Burbank. Judging from my association with the deceased I am of the opinion that during my acquaintance with him, which was between the dates in this interrogatory inquired about that he was

mentally competent to make a valid last will and testament, and was competent, mentally on say the 22nd day of March, 1910 to make a valid last will and testament. I don't know anything about the will inquired about, but in my opinion and belief the deceased was mentally competent and capable at the date of its making to understandingly make a valid last will and testament. I conversed with him more or less every time I shaved him, and he was in said shop twice a week during his residence in Temple, Texas, and I saw him at such times, and had a very good opportunity of sizing him up mentally. He impressed me as being thoroughly at himself and possessing good mental powers. I never suspected him of being anything but al- right in these respects and am of the opinion and
228 belief that he was absolutely of sound and disposing mind and memory. I am not a physician or surgeon and do not testify as such. At no time I saw him, talked with him, or heard him talk with others, do I think the testator was in a critical or acute state mentally or otherwise, and his intellect and mental manifestations and powers wer- not, in my judgment, such as to render said testator mentally incompetent to make said will and understand the same.

(Sg.) H. M. BROWN.

Sworn to and subscribed before me this 17th day of August, 1910.

(Sg.) W. S. LEMLEY,
[SEAL.] *Notary Public, Bell County, Texas.*

Answers to Interrogatories.

To the First Interrogatory He Answers: My name is Enoch Barber. I am forty five years old, reside at Temple, Bell County Texas, and am the proprietor of a barber shop in said City.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank a short time before his death. I don't remember exactly when I met him, but it was some time in the early part of this year. He was a very regular customer of my shop, and I think I first met him in my shop. I do not remember the exact length of our acquaintance, it was somewhere about three months, and he continued to come to my shop to be waited on until the time of his death, and with the exception of a few times, I think he came twice every week.

To the Third Interrogatory He Answers: I do not know that he was actually domiciled in Temple, Texas, where I saw him between the dates in question, and do not know where he resided in this City,
229 that is; of my own knowledge. I only know that for several months he was a frequent customer of my shop during the time testified about.

To the Fourth Interrogatory He Answers: I don't know anything about T. Scott Burbank having made his permanent domicile

in Texas, or of his having made verbal or written declaration as to his intention to make or to have made or established his permanent domicile in Temple, or any other place in the State of Texas.

My relations with him were of the business nature testified about, and existed between the dates indicated. I personally waited on him once or twice, and saw him in the shop frequently when others waited on him, nothing was said at such times relative to his having made Texas, and especially the City of Temple in said State his permanent domicile.

To the Fifth Interrogatory He Answers and Says: Of my own knowledge I am unable to make any response to this interrogatory.

To the Sixth Interrogatory He Answers and Says: I met said T. Scott Burbank during the time stated, at the place and in the manner already testified about. He was during said period and at the times I met him, in my opinion, mentally competent to make such valid last will and testament. I have not seen, read or heard read, the will in question, but said T. Scott Burbank was in my opinion and belief, mentally competent and capable at the date of its making to so make it understandingly. My opinion is not based on professional knowledge or experience, but on my observation of the deceased on the several occasions I saw him. In the barber shop I speak of, he of course removed his hat, and observing the sunken place in his head, I naturally observed him more critically than I would most customers in the shop. His general bearing, demeanor, and speech seemed to be in all respects all right, and I never saw anything about him to suggest that he was mentally incompetent to transact any ordinary business, or that he was not of sound mind and memory. At no time while I knew him was he in my opinion in any other than a normal state mentally and physically, and his intellect and mental manifestations and powers were not in my judgment such as to render him mentally incompetent to make said will and understand the same.

(Sg.) E. A. BARBER.

Sworn to and subscribed before me this 17th day of August, 1910.

(Sg.) W. S. LEMLEY,

[SEAL.] *Notary Public, County of Bell, Texas.*

Answers to Interrogatories.

To the First Interrogatory He Answers and Says: My name is O. F. Gober. I am thirty two years old, reside at Temple, in the State of Texas, and am a practicing physician and surgeon.

To the Second Interrogatory He Answers: Yes, I personally knew T. Scott Burbank. And met him some time in the — part of this year. Don't know where I met him the first time, but saw him and met him often between that time and the time of his death.

To the Third Interrogatory He Answers: From say the 10th of February, 1910, until the date of his death, he was actually domi-

oiled in Temple, Bell County, Texas; he resided in said city with Dr. James M. Woodson, whose home was located on West Down Avenue.

To the Fourth Interrogatory He Answers: I don't know anything about the decease- having made a specific declaration as to his intention to make, or as to his having made or established his
231 permanent domicile at this place, but he always spoke of Temple as though it was his home and so regarded it. I was related with him, both socially and professionally between the dates in question. I talked with him frequently during that time, and as stated he always spoke of the City of Temple and the State of Texas as his home, and never spoke of any other place as his home.

To this Fifth Interrogatory He Answers and Says: As to the question of his residence and domicile I am unable to testify further than I have already done in my foregoing answers, unless it might be that I know that he placed his little daughter in Baylor College which is located at Belton in this County.

To the Sixth Interrogatory He Answers: Between the dates mentioned in this interrogatory I met him frequently at my office, Dr. James Woodson's office, Dr. James Woodson's residence, on the street, and perhaps at other places I do not recall. I met him in social intercourse, and also in a professional way during the period testified about, and at the times I met him, he was mentally competent to make a valid last will and testament and he was, say on the 22nd day of March, 1910, mentally competent to make such valid last will and testament. I know of the existence of such will but have never seen, read, or heard read the will in question. But from my knowledge of, and acquaintance with the testator therein, T. Scott Burbank was in my opinion and belief mentally competent and capable at the date of its making to make it understandingly. I was rather intimately associated with the deceased during the several months I knew him, and had ample opportunities for observing him, testing his memory and inquiring into the history and nature of the operation that had been performed on his skull. I found him at all times to be a person of good judgment, reliable memory, capable of expressing himself and thinking intelligently, and at no
232 time did I ever see or notice anything in him, his demeanor or speech, which indicated that he was not of sound mind and memory and fully competent and capable of transacting properly any ordinary business. As stated and suggested I am a practicing physician and surgeon, being a graduate of the State University, that is the Medical Department of the State University, which is located at Galveston, Texas. I have had five years actual practice during which time I have been connected with the Sante Fe Hospital of Temple, as well as engaged in the general practice in said City. As such physician and surgeon I state unhesitatingly, that during the time I knew him, the surgical operation therefore made on the skull and brain of the testator did not effect the mental competency of said testator to make the last will referred to on the 22nd, day of March, 1910. At no time while I knew him was the testator in a critical

of acute state, and his intellect and mental manifestations and powers were not in my judgment, such as to render said testator mentally incompetent to make such will and understand the same, but on the contrary, all things considered, I feel warranted in saying that he was thoroughly competent during all the time I knew him, to understandingly make such an instrument.

(Sg.) O. F. GOBER, *M. D.*

Sworn to and subscribed before me this 18th day of August, 1910.

(Sg.) W. S. LEMLEY,

[SEAL.] *Notary Public, Bell County, Texas.*

Answers to Interrogatories.

To the First Interrogatory He Answers: My name is A. C. Scott. I am 45 years old. I reside at Temple, Texas, and am a practicing physician and surgeon.

233 To the Second Interrogatory He Answers: I personally knew T. Scott Burbank. I knew him in the early part of this year, met him shortly after he came to Temple and think our first meeting was at the Grace Presbyterian Church. Our acquaintance continued until the time of his death.

To the Third Interrogatory He Answers: It was my understanding that the deceased was actually domiciled in Temple, Texas, between the dates inquired about and resided with Dr. James M. Woodson, at the corner of West Down Avenue and Third Street in said City during that time.

To the Fourth Interrogatory He Answers: It is my understanding that the deceased had made his permanent domicile in Texas. My relations with him were both social and professional. I had a number of conversations with him, meeting him at church, the Temple Sanitarium, Dr. Woodson's office and other places, and I must have obtained this understanding from declarations made by him, although I cannot recall any specific declarations made by him on the subject.

To the Fifth Interrogatory He Answers: I knew of his having placed his little girl in Baylor College at Belton, Texas.

To the Sixth Interrogatory He Answers: I met him from time to time at the various places heretofore mentioned, sometimes our meetings were purely social and at other times I met him in a professional way. During the period testified about and at the time I met him, I think he was mentally al- right and competent to make a valid last will and testament. And that he was mentally competent and capable on the date of its making herein stated to make same understandingly. I have never read the instrument in question, or have I heard it read. He always talked sensibly on every subject he discussed, showed no evidence whatever of mental aber-ation. Generally he seemed to be a person of good common sense and judg-

234 ment, and capable of transacting any ordinary business. I am a practicing physician and surgeon as stated, as such give it as my opinion that the surgical operation theretofore on the skull

and brain of the testator did not affect, during the time I knew him, the mental competency of said testator to make the will in question on the date particularly inquired about. At no time I knew him, or ever saw him, did I find the testator in an acute or critical state, and his intellect and mental manifestations and powers during all the times testified about, were in my opinion and judgment such as to render the deceased competent to make the will in question and to understand the same.

(Sg.) A. C. SCOTT, *M. D.*

Sworn to and subscribed before me this 19th day of August, 1910.

(Sg.) W. S. LEMLEY,
[SEAL.] *Notary Public, Bell County, Texas.*

Answers to Interrogatories.

To the First Interrogatory He Answers: My name is N. C. Erskine. I am 40 years old, reside at Temple Texas. I am connected with the Lumber business corporated under the name of Markman Erskine & Company.

To the Second Interrogatory He Answers: Yes, I personally knew T. Scott Burbank. I met him in the early part of this year. I do not remember exactly when. Think I first met him in the First Presbyterian Church of Temple, Texas. Our acquaintance continued until his death.

To the Third Interrogatory He Answers: T. Scott Burbank was actually domiciled in said City, during the period of time inquired about. He resided during that time at the corner of West
235 Downs Avenue and Third Street, with Dr. James M. Woodson.

To the Fourth Interrogatory He Answers: I know something respecting his having made his permanent domicile in Texas, and in the City aforesaid. My relations with him were purely social. I conversed with him briefly several times. One occasion in my presence and hearing I heard him make a declaration of having made his permanent domicile in the City of Temple.

To the Fifth Interrogatory He Answers: The only response I could make to this interrogatory can be found in my answers to the preceding interrogatories, and I may add that he made such declaration in the presence of Dr. and Mrs. James M. Woodson, Dr. Wm. Woodson, H. K. Black, J. E. Green, and possibly one or two others, whom I do not remember just now.

To the Sixth Interrogatory He Answers: I met him during the early part of this year, between the dates particularly inquired about, and I think before February 10, 1910. Met him at church and several times on the street. During said period of time, and at the times I met him, he impressed me as being mentally competent to transact any ordinary business, such as the making of a valid last will and testament, and this statement applies to the date particularly inquired about, as well as the entire period of time in question. I have never seen, read, or heard read, the will, asked about, but as the testator was, every time I saw him, as far as I was able to judge, in

a sound state of mind, capable of exercising discretion and showing good judgment and common sense, I am of the opinion and belief that he was mentally competent and capable at the date of its making to understandingly make the same. I cannot testify from professional knowledge or experience, so make no reply to that part of this interrogatory, which is addressed to physicians and surgeons.
236 At no time I saw him, was the testator in a critical or acute state, and his intellect and mental manifestations and powers, in my judgment were such as to render said testator mentally competent to make said will and understand the same.

(Sg.) N. C. ERSKINE.

Sworn to and subscribed before me this 18th day of August 1910.

(Sg.) W. S. LEMLEY,
Notary Public, Bell County, Texas.

Answers to Interrogatories.

To the First Interrogatory He Answers: My name is H. K. Black. I am 54 years old, reside at Temple, Texas, said city being located in Bell County. I am in the empl-y of A. B. Crouch, Grain dealer.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank. My acquaintance with him lasted several months prior to his death. I don't remember exactly when I met him. I was introduced to him first, I think, in the First Presbyterian Church of this City.

To the Third Interrogatory He Answers: It was my understanding that T. Scott Burbank was actually domiciled in Temple, Bell County, Texas, between the dates inquired about in this interrogatory. He was a member of the family of Dr. James Woodson, who resides at the cornor of Third Street and West Down Avenue in said City.

To the Fourth Interrogatory He Answers: I know something respecting his, T. Scott Burbank's having made his permanent domicile in the City of Temple in the State of Texas. This understanding grew out of his making himself or giving his assent to the declaration made by another, I am not positive now just how it was made, to the effect that he intended making Temple, Texas.
237 his permanent domicile. My relations with the deceased. were purely social. I suppose I met him during the time inquired about ten or a dozen times, having met him both at church and on the streets. We did little more than exchange greetings at the church, except on one occasion, but several times, I had short conversations with him on the street.

To the Fifth Interrogatory He Answers: In my foregoing answers I have stated all I know as to the matter of his intention to make and establish his permanent domicile at Temple, Texas, Dr. James Woodson, Dr. William Woodson, J. E. Green, N. C. Erskine and myself were present, also Mrs. James Woodson, on the occasion of him making the declaration above testified about.

To the Sixth Interrogatory He Answers: In my foregoing answers, I have stated where, how and when I met the deceased. During the period testified about and at the times I met him in my judgment he was mentally competent to make a valid last will and testament, and was say, on the 22nd, day of March, 1910, mentally competent to make such last will and testament. Of my own knowledge I know nothing about the will in question, and have never seen it, or heard it read, but in my opinion and belief, T. Scott Burbank was mentally competent and capable at the date of its making to understandingly make a valid last will and testament. The deceased impressed me as being a man of intelligence and good common sense. He talked sensibly and rationally about all matters that came up in the conversations and I believe he was thoroughly qualified and competent to transact any ordinary business. I never at any time detected any evidence of mental incompetency. I am not a physician or surgeon, and testify as a layman, basing my opinion on my acquaintance and conversations with the deceased, and my knowledge of him, and my knowledge of men and their mental ability. Not being a physician or surgeon, I make
238 no response to that part of this interrogatory which asks whether the surgical operation theretofore had on the skull of the testator, affected during the time I knew him, his mental competency to make the will in question. At no time I met the testator or knew him, between the dates testified about was he in a critical or acute state, and I am of the opinion that his intellect and mental manifestations and powers were not such as to render him mentally incompetent to make the will in question and understand the same.

(Sg.) H. K. BLACK.

Sworn to and subscribed before me this 18th day of August, 1910.

(Sg.) W. S. LEMLEY,
Notary Public, Bell County, Texas.

[SEAL.]

Clara Willis.

To the First Interrogatory She Answers: My name is Clara Willis, I am 20 years old and reside at Temple, Texas, and am a stenographer in the employ of Dr. J. M. Woodson.

To the Second Interrogatory She Answers: I personally knew T. Scott Burbank. I first met him at the office of Dr. James M. Woodson a day or two after he arrived in this city (Temple, Texas). I don't remember just when that was, but to the best of my recollection it was in the early part of January of this year. Our acquaintance continued until the time of his death.

To the Third Interrogatory She Answers: He was actually domiciled between the dates in question in Temple, Texas, Bell County, Texas, and resided with Dr. James M. Woodson, who resides at the cornor of West Downs Avenue and Third Street, in Temple,
239 Texas.

To the Fourth Interrogatory She Answers: I know some-

thing about Mr. Burbank having made his permanent domicile in Temple, Texas. My relations with him were both social and business, and in the capacity of a stenographer in the office of Dr. Woodson. He dictated to me and I wrote for him a letter addressed to Mrs. Joseph De Silva, Rock Island, Illinois, in which letter he informed the lady addressed, who I understand is a sister of the deceased, that he had established his home and permanent domicile in this city, that is Temple, Texas. To the best of my recollection this letter was written in the early part of March of this year, and between the dates mentioned in this interrogatory.

To the Fifth Interrogatory She Answers: In the letter above referred to he requested his sister to send him his papers, and such things, I also knew of his placing his daughter in Baylor College in Belton, Texas, in this County, and heard him say that he expected her to finish school there. I heard him repeatedly state that he intended to make this his home until his death. He was generally in the private office when he made these statements and declarations, and Dr. William Woodson, who is now confined to his home as a result of a stroke of paralysis, was present at one or more times; when he made same.

To the Sixth Interrogatory She Answers: I have in my foregoing answer stated when, where and the circumstances of my association with the deceased. During the period of time mentioned and on the various occasions I saw him, which was almost daily, he was mentally competent in my judgment to make a valid last will and testament, and was on the 22nd. day of March, 1910, mentally competent to make said valid last will and testament. I have
240 seen and read the will in question, and in my opinion and belief, T. Scott Burbank was mentally competent and capable at the date of its making to understandingly make the same. I talked with him often, always engaged him in conversation when he came in the office. He was slow, quite and deliberate in speech, but talked easily, sensibly and clearly about any subject in conversation that he was engaged in. I wrote business letters which he dictated, and such character of letters were always easily dictated by him, without any mental effort. He seemed to know exactly what he wanted to do and he was always capable of handling the matters in a business like way. I never detected any evidence whatever of mental aber-ation in the deceased, and think he was of sound and disposing mind and memory at the time of the making of the will in question. I do not base my testimony on professional knowledge or experience, hence make no response to that part of this interrogatory which solicits an answer from physician or surgeons with reference to the effect which the operation on the brain and skull of the testator might have had on his competency to make said will in question on the date of its making. At no time I knew him or saw him, was the testator in a critical or acute state, and in my judgment his intellect and mental manifestations and powers were such as to render him mentally competent to make said will and understand the same.

(Sg.) CLARA WILLIS.

Sworn to and subscribed before me this 23rd, day of August, 1910.

(Sg.) W. S. LEMLEY,
[SEAL.] *Notary Public, Bell County, Texas.*

241 *R. R. White.*

To the First Interrogatory He Answers: My name is R. R. White. I am 38 years old. I reside in Temple, Bell County, Texas, and am a practicing physician and surgeon.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank, who I met for the first time in the City National Building in the early part of this year. The exact date I do not recall, and our acquaintance continued until the time of his death.

To the Third Interrogatory He Answers: The deceased was actually domiciled between the dates inquired about in Bell County, Texas, and resided with his brother-in-law, Dr. James M. Woodson, on West Downs Avenue in the City of Temple. The relations I had with the deceased, was both social and professional. I never discussed with him the question of his permanent residence and am unable to make any further response to this interrogatory, except to say that during the time of our acquaintance which time covered the dates inquired about, that is the 10th day of February, 1910 and the date of his death, May 10th, 1910, I conversed with him probably three or four times in addition to this, I met him several times when we simply exchanged greetings.

To the Fifth Interrogatory He Answers: I might say in response to this interrogatory that it was my understanding that he placed his child of tender years in Baylor College at Belton, Texas, a nearby town, and, that it was my general understanding because of this and other things of general nature that he had made this place, that is Temple, Texas, his home.

To the Sixth Interrogatory He Answers: In my foregoing answer I have stated, how, when and where, for the greater part I met the deceased between the dates inquired about, that is, during
242 February 10th, 1910, and May 10th, 1910. In my opinion during that period and at the time I met him he was perfectly competent mentally, to make a valid last will and testament and was competent on the 22nd day of March, 1910, mentally to make such a last will and testament. I have never seen, read or heard read the original of the will in question, and I know nothing whatever with reference to its provisions. But it is my opinion and belief that T. Scott Burbank was mentally competent and capable at the date of its making to understandingly make the same. My opinion is based on my examination- made of the deceased, two or three in number, and my several conversations with him. I am a practicing physician and surgeon and speak professionally, as well as, in a general way, I am a graduate of the Tulane University of Louisiana, and connected with the Sante Fe Hospital in Temple, Texas, as one of its chief surgeons, also the Temple Sanitarium, a private institution. Graduated in 1903, having taking several special courses since that time. As such physician and surgeon it is my

unqualified opinion that the surgical operation theretofore on the skull of the testator did not affect during the time I knew him, the mental competency of the deceased, to understandingly make the will in question on the date of its execution. That is I mean to say, that it in no wise affected his mental competency to execute said will at said time. The testator at no time I saw him was in a critical or acute state. Of course I have no reference to the condition I saw him on the date of his death, I have seen him prior to his death, and after he was shot, I gave it as my judgment, that his mental manifestations and powers, and intellectual condition were not such between the dates in question to render said testator mentally incompetent to make said last will and testament, and under-
243 stand the same.

(Sg.) R. R. WHITE,

Sworn to and subscribed before me this 24th day of August, 1910.

(Sg.) W. S. LEMLEY,
Notary Public, Bell County, Texas.

Charles M. Campbell.

To the First Interrogatory he answers: My name is Charles M. Campbell. I am thirty six years old, reside at Temple, Bell County, Texas, and am President of the City National Bank of Temple.

To the Second Interrogatory He Answers: I personaliy knew T. Scott Burbank. I met him in Temple, Texas, in the early part of this year, and our acquaintance continued until the time of his death.

To the Third Interrogatory He Answers: T. Scott Burbank was actually domiciled in Temple, Bell County, Texas, between the dates inquired about in this interrogatory and resided with Dr. James M. Woodson, at the cornor of West Downs Avenue and Third Street. I do not know the number of his residence.

To the Fourth Interrogatory He Answers: I knew something about Burbank having made his permanent domicile in Texas. I met his socially and in a business way, every few days. I had various conversations with him, and he told me of his intention to make Temple, Bell County, Texas, his permanent home, in fact told me, he had established his home here. I do not recall who,
244 if any one was present at the time of his making the statement to me.

To the Fifth Interrogatory He Answers: Of my own knowledge I cannot state any other facts tending to show that the deceased had established his permanent domicile at this place.

To the Sixth Interrogatory He Answers: I have in my foregoing answers stated when, where and under what circumstances I met and conversed with the deceased. During the period of time inquired about in these interrogatories and at the various times I met him, he was mentally competent to make a valid last will and testament, and on the date particularly inquired about, to-wit: the 22nd

day of March, 1910, he was mentally competent to make such last will and testament. I have seen the original will inquired about, I have never read the same, but knowing the testator as I did, during his residence here and at the time of its execution, I am of the opinion and belief that he was mentally competent and capable of understandingly executing the same. I have been in the engagement of the Banking Business for about eight years, and I have been engaged in other business prior to that time, which required my constant dealing with men, and I give it as my judgment it being my business to constantly pass upon the business ability and capacity of men, and passing upon the merit of crediting etc., I gave it that the testator was a man of good judgment and capable of transacting any ordinary business. I do not base my opinion upon professional experience or knowledge, hence I do not undertake to say whether the surgical operation performed on the skull and brain of the testator prior to the making of the will in question, affected his mental competency to make said will on the date in question. At no time during my acquaintance with the deceased did I know of his being in a critical or acute state, and his intellect and mental manifestations and powers were such, that in my judgment, he was mentally competent to make said will and understand the same.

245 (Sg.) CHAS. M. CAMPBELL.

Sworn to and subscribed before me this 27th day of August, 1910.

(Sg.) W. S. LEMLEY,
Notary Public, Bell County, Texas.

Charles Russell.

To the First Interrogatory He Answers: My name is Charles Russell. I am 38 years old, reside at Temple, Bell County, Texas and am a barber by occupation.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank and met him in Enoch Barber's barber shop for the first time, which was in the early part of this year. I cannot recall the exact date of our first meeting. Our acquaintance continued until the time of his death.

To the Third Interrogatory He Answers: Of my own knowledge I don't know where T. Scott Burbank was actually domiciled between the dates in question, or where he resided during that time. On this point I can only say that every two or three days for several months in the early part of this year, he came to the barber shop above testified about, to have his work done.

To the Fourth Interrogatory He Answers: I don't know anything about Burbank having made his permanent domicile in Texas. My relations with him were of a purely business character, and while working for — I talked with him a number of times, but I do not recall having heard him say anything about his permanent residence.

To the Fifth Interrogatory He Answers: Of my own knowledge

I do not know of any facts tending to show that T. Scott
246 Burbank has established his permanent domicile at Temple, or any other place in the State of Texas.

To the Sixth Interrogatory He Answers: I have in my foregoing answers stated when, where and under what circumstances I became acquainted with, and from time to time, met the deceased. During the period testified about and at the times I met him, my judgment is, that he was mentally competent to make a valid last will and testament, and that on the date especially inquired about, he was mentally competent to make such valid last will and testament. I have never seen, read or heard read, the original of the will in question, but it is my opinion and belief that the testator therein, T. Scott Burbank, was mentally competent and capable at the date of its making to understandingly made the same. My opinion is not based on professional knowledge or experience (I am not a physician or surgeon), but is based upon my knowledge of men generally, and my observation of and acquaintance with the deceased. Like the proverbial barber, I am giving to talking and asking questions and although I found Mr. Burbank predisposed to be quiet and reserved, I frequently engaged him in conversations by asking him questions, and while not talkative, he was always courteous, though somewhat pointed and direct in his answers. He talked with good sense, said just what he wanted to say, and then stopped. I noticed this and spoke to the barbers in the shop about it. I sized him up, as a man of few words, but good judgment and common sense. He impressed me as a man of good memory, and of sound mind. Not being a practicing physician or surgeon, I do not undertake to say whether the surgical operation which had been performed on the skull and brain of the testator affected, during the time that I knew him, or on the date of its execution, his capacity and competency to execute the will in question. At no time I knew or ever saw the deceased, was he in an acute or critical
247 state, and in my judgment, his intellect and mental manifestations and powers were such as to render him mentally competent to make said will and to understand the same.

(Sg.) CHARLES RUSSELL.

Sworn to and subscribed this 29th day of August, 1910.

(Sg.) W. S. LEMLEY,
Notary Public, Bell County, Texas.

William Woodson.

To the First Interrogatory He Answers: My name is William N. Woodson. I am about 70 years old. I reside at Temple, Bell County, Texas, and my profession is that of physician and surgeon.

To the Second Interrogatory He Answers: I personally knew T. Scott Burbank during the time he resided at Temple, Texas, meeting him first, I think a day or two after he came here, meeting him, in the office of Dr. James Woodson and myself.

To the Third Interrogatory He Answers: T. Scott Burbank was actually domiciled in Temple, Bell County, Texas, between the dates in question, and resided with Dr. James M. Woodson at the cornor of West Downs Ave. and Third Street.

To the Fourth Interrogatory He Answers: Yes, I knew something about Burbank, having made his permanent domicile in Texas. My relations with him were social for the greater part, I meeting him almost daily in the office above mentioned. Several times I went driving with him, and on one or more occasions he told me that he decided to make and had established Temple, in said State as his home.

248 To the Fifth Interrogatory He Answers: I know of his having placed his little girl in Baylor College which is located at Belton, in said County, and of his doing so on account of its nearness to his home. I think the declaration of residence as above testified about was made solely in my presence at least I do not recall just now, whether there was anyone else present. I know the matter was referred to one or more times, when we were out driving, and no one else was present then.

To the Sixth Interrogatory He Answers: I have indicated in my foregoing answers where, when and the circumstances of my various meeting- and conversations with the deceased. During the time inquired about in these interrogatories and at the several times I met him, (I met him almost daily as stated), he was mentally competent to make a valid last will and testament, and on the date especially asked about, he was mentally competent to make such valid last will and testament. I have seen the will in question and I heard it read, and in my opinion and belief, T. Scott Burbank, was mentally competent and capable at the date of its making to make it understandingly. As stated, I had frequent, almost daily conversations with the said testator. We talked, crops, property, cities, and about any and every thing that was — mutual interest to us. I tried to have a horse trade with him, tried to sell him my colt for his little girl, who was very anxious for her papa to buy her, but he knew just what he wanted and what he did not want, and courteously, but positively said no, he did not have any use for the colt. In this, as in all other matters, I have found him always sufficiently capable of taking care of his own interest, and transacting any ordinary business. He was sensible, and manifested good judgment in his views and treatment of all questions discussed by him. He talked to me about matters in New

249 Orleans and various places that were of mutual interest to us, intelligently, and I never noticed and failure of memory or lack of mental capacity manifested on any subject he discussed. I am a physician and surgeon as above stated; I graduated from Bellview Medical College in New York, in 1869, and have practiced my profession for the greater part of the time since then. I have taken two special courses in New Orleans and one in Chicago, and as such physician and surgeon, I give it as my opinion that the surgical operation theretofore, on the skull and brain of the testator, did not affect, during the time I knew him the mental competency of said testator to make said will on the date of its execution. The

testator was not in a critical or acute state at any time that I knew him. And his intellect and mental manifestations and powers were not in my judgment such as to render said testator incompetent to make said will and understand the same. But on the contrary it is my opinion and belief that he was of sound and disposing mind and memory, was sufficiently qualified and competent to transact any ordinary business, was a person of good judgment and common sense, and was mentally qualified to make and understand a valid last will and testament.

(Signed) WILLIAM M. WOODSON.

Sworn to and subscribed before me this 29th, day of August, 1910.

(Sg.) W. S. LEMLEY,
[SEAL.] *Notary Public, Bell County, Texas.*

W. S. Banks.

To the First Interrogatory He Answers: My name is W. S. Banks. I am fifty years old, and reside in the City of Temple, Bell County, Texas, and am a lawyer by profession.

250 To the Second Interrogatory He Answers I knew T. Scott Burbank personally. I saw him frequently for probably one or two months before I personally met him, that is before I was introduced to him. I first became actually acquainted with him, that is introduced to him, about the 12th, day of March, 1910, and I knew him thereafter until he died.

To the Third Interrogatory He Answers: T. Scott Burbank was actually domiciled in the City of Temple, County of Bell, and State of Texas, during the period inquired about, that is, say from February 10th, 1910, to the date of his death, which I believe was May 10th, 1910, his domicile was with Dr. James M. Woodson (Dr. Woodson's wife Mrs. Anna M. Woodson being the sister of Mr. Burbank), who reside- at No. 204 West Down Avenue in the City of Temple.

To the Fourth Interrogatory He Answers: My residence is about three blocks west and one block north of Dr. James M. Woodson's residence, and I usually, in coming to my office, or in going from my office to my residence, when I walk, pass in front of Dr. Woodson's residence, (the street car takes me in another direction) and in passing Dr. Woodson's residence, say from the early part of February, 1910 I saw Mr. Burbank often out on the lawn or upon the gallery, so I knew who he was, and had seen him often before I ever met him. I first met him about the 12th day of March, 1910. I met him by appointment in Dr. Woodson's office. He then stated in the conversation I had with him that he had made his permanent home here (that is Temple Texas) that he had left Louisiana for good, and had brought his daughter with him and had placed her in Baylor College (which is in Belton, Bell County, Texas, about eight miles from Temple, and there is an electric trolley line between Temple and Belton; That his first intentions were to make his home in Illinois with his sister, Mrs. De Silva, but

that he found that the winter climate there was too severe,
251 and that he could not stand it. He had tried the climate here, Temple, Texas, and was pleased with it, and had made this place (that is Temple, Texas) his home and expected to live here the remainder of his life. The occasion of my meeting him was that he wanted to make a will, and that was the occasion of going into the discussion of his affairs. I made an appointment for him to come to my office. He did afterwards probably in a day or two come to my office. He then went over the same ground and told me that he was making Texas his home, that it was his home, and he expected to live here the rest of his life. He had left Louisiana for good, and on account of the climate in Illinois he had left there, and was going to live here; that he wanted a will made that would be valid under the laws of the State of Texas; that he expected to live and die in Texas; and he wanted his daughter to be educated in Texas.

To the Fifth Interrogatory He Answers: My answer to the fourth interrogatory covers much of the question here propounded, and I refer to that portion of my answer. But I further state that upon my first meeting Mr. Burbank he stated to me that he had come to Temple, to live and he was going to live here for the rest of his life; that he is going to live in Temple, Texas; that he left Louisiana for good; that the Ilinois climate was too severe for him, he could not stand the winter there; that he tried Temple, Texas, was satisfied with the climate and was going to make his home in Temple, and had brought all of his movable property here. He had been here then some months, and I have seen him often at the home of Dr. Woodson as I passed to and from my office and residence. As stated in my answer to the foregoing fourth interrogatory I first met him in Dr. James M. Woodson's office. He told me that he wanted to make a will, valid under the Texas laws. I asked him to come to my office and we made an appointment, and
252 he came. Dr. Woodson and Mrs. Woodson came with him. I know that I told him that I would prefer one or the other to come with him, as he had not previously known me. They came to my office and he again discussed the matter with me very thoroughly, and told me what I have heretofore stated; that he asked me to write a will, that would be valid under the laws of the State of Texas; that he was anxious for the protection of his daughter, and he wanted to shape his affairs so that she would be protected, and he wanted her to complete her education in Texas.

To the Sixth Interrogatory He Answers: I met Mr. Burbank as stated in the foregoing answers about the 12th day of March, 1910. As stated before I had seen him often before that out on the lawn or upon the gallery at Dr. Woodson's residence. As stated I met him personally about the 12th day of March, 1910, and I met him several times after that before the time his will was executed. After I met him I often stopped and conversed with him on Dr. Woodson's lawn, as I — passing going to or from my home and office. During all these times Mr. T. Scott Burbank demonstrated to me that he was of sound mind and intellect; that he knew exactly what he wanted to do, and what he was doing; nothing that he said or did indicated

to me any incapacity to make a will, but on the other hand he knew exactly what he wanted. He was so far as I could judge, well balanced, of good mind, sane, and amply capable of making a will, or doing any other act and transacting any business, I knew Mr. Burbank at the time that he made this will and I believe he was unquestionably of a sound and disposing mind and memory. He knew what he was doing and everything that he did, and so impressed himself upon all the parties that were connected with him. I wrote the will. I wrote it under the directions of Mr. T. Scott Burbank, and he was on the date in question, to-wit, the 22nd day of March, 1910, in my opinion and belief, mentally com-
253 petent and capable to make it understandingly. I do not base my answers aforesaid upon professional knowledge, that is to say; I am not a physician or surgeon, my answers are based upon my acquaintance with the testator, my study of human nature, and my knowledge of men. I do not undertake to say anything about the effect or possible effect of the operation performed on his skull as I profess no knowledge of medecine or surgery, but I do say that at all the times I knew him, he had a good and sound mind, and intellect, and was intellectually capable of making a will or transacting any other business. At no time I knew the testator was he in a critical or acute state, and my judgment is, that his intellect and mental manifestations and powers were such, on the date of its execution, as to render the testator mentally competent to make said will and understand the same.

(Sg.). W. S. BANKS.

Sworn to and subscribed before me this 31st day of August, 1910.

(Sg.) W. S. LEMLEY,
Notary Public, Bell County, Texas.

Interrogatories, Cross-Interrogatories, Depositions of Mr. & Mrs. De Silva, and Documents Attached.

Filed November 5th, 1910.

Commission.

Civil District Court for the Parish of Orleans.

No. 93752.

The State of Louisiana, to any Notary Public, duly commissioned and qualified, in and for the County of Rock Island, State of Illinois, Greeting:

254 SUCCESSION OF T. SCOTT BURBANK.

Know ye that we, reposing confidence in your prudence and fidelity, do, by these presents, give unto you authority diligently to ex-

amine all witnesses whatever, as well on the part of the plaintiff as of the defendant, in a certain suit now pending in the Civil District Court for the Parish of Orleans, wherein James M. Woodson, and his wife, Anna M. Burbank, have filed their application to be recognized as, respectively, executor and executrix of the last will and testament of said T. Scott Burbank.

Witnesses:
DR. JOSEPH DESILVA, AND
MRS. MEMIE E. DESILVA,
His Wife.

Therefore, We desire you, that at certain times and places, by you to be appointed for that purpose, you cause the said witnesses to come before you, that you then and there examine them apart upon their respective corporal oaths first taken before you upon the Holy Evangelists; that you reduce their examination to writing, and cause the witnesses to sign the same; and when you shall so have taken them, that you send the same, with this commission, closed up under your seal, to us in our Civil District Court in the City of New Orleans, within a delay of fifteen days from date hereof.

Witness the Honorable E. K. Skinner, Judge of said Court, this — day of July, in the year of our Lord, one thousand
255 nine hundred and ten and the 135th year of the Independence of the United States.

(Sg.) J. G. LYNCH,
[SEAL.] *Deputy Clerk.*

Interrogatories to Mr. & Mrs. De Silva.

Civil District Court, Parish of Orleans.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Interrogatories accompanying commission propounded to Dr. Joseph De Silva and Memie E. Burbank, his wife, of the City of Rock Island, County of Rock Island, State of Illinois, witnesses on behalf of Dr. James M. Woodson, and his wife, Anna M. Burbank, petitioners, on their application filed herein to be recognized as respectively, Executor and Executrix, and for registry of will of T. Scott Burbank, deceased; said Interrogatories to be answered under oath and their answers to be used as evidence for said applicants on the hearing of their said application.

First Interrogatory. Please state your full name, age, residence and occupation or profession?

Second Interrogatory. Please to state whether or not you received from the above named T. Scott Burbank, between say the 10th of February, 1910, and the 22nd, day of March, 1910, any letter or

letters, written or signed by him and addressed to you or either of you, referring directly or indirectly to any purpose or intention, on his part, to establish, or to having established, his permanent
256 residence or domicile in Temple, in the State of Texas; and, if you have such letter in your possession, annex the same to and make it part of your answer to this Interrogatory; and if you have the envelope in which the same was enclosed to you, also, annex the same to and as part of your answer hereto; and state what, if anything you did, in consequence of the request or requests contained in said letter.

(Sg.) RICE & MONTGOMERY,
A. E. BILLINGS,
Of Counsel.

Depositions of Joseph De Silva.

STATE OF ILLINOIS,
County of Rock Island, ss:

Be it known that on the days and dates hereinafter written and pursuant to the commission, to which this is attached, issuing out of the Civil District Court, of the Parish of Orleans, State of Louisiana, in the cause pending therein, entitled Succession of T. Scott Burbank, numbered 93752 of the docket of said Court, directed to any Notary Public, duly commissioned and qualified, in and for the county of Rock Island, State of Illinois, personally came and appeared before me, the following named witnesses: Dr. Joseph De Silva and Mrs. Memie E. De Silva who having been first duly sworn by me, to tell the truth, the whole truth and nothing but the truth, in answer to the Interrogatories to said commission annexed, and now annexed to as part of these depositions, and returned therewith to said Civil District Court, did each for himself and herself answer thereto, as follows:

257 Joseph De Silva, saith as follows: to interrogatory first: My name is Joseph De Silva, age forty five years, residence, Rock Island, Illinois; profession, physician and surgeon.

To Interrogatory Second: I did not personally receive such letter. The letters of T. Scott Burbank were always addressed to my wife, Memie E. Burbank De Silva, a sister of T. Scott Burbank, my wife received several letters from him during the period mentioned in the interrogatory, one of which is hereto attached, marked "Exhibit A" which was written by him and signed by him and addressed to my said wife, and received by her on or about the 9th day of March, A. D., 1910 in the envelope hereto attached and marked "Exhibit B" in which letter he declared his intention of making his home in Temple, Texas, and requested the forwarding of certain property to him at Temple, Texas.

I and my wife upon receiving said letter, shipped to him to Temple, Texas, his bank box and draft for money in Bank and photographs and several barrels and boxes of household goods.

(Sg.) JOSEPH DE SILVA.

And thereupon, Memie E. Burbank De Silva, saith as follows:

To Interogatory First: My name is Memie E. Burbank De Silva, age forty nine, residence Rock Island, Illinois, occupation housewife.

To Interrogatory Second: I did receive a letter from my brother T. Scott Burbank, dated Temple, Texas, March 4th, 1910, which letter was written by him, and the signature to which I know to be his own; which letter was addressed to me and was received by me on or about March 9th, 1910, wherein he declared his intention of making his home in Temple, Texas, and requests that I send to him at Temple, Texas, certain property; and thereupon I and my
258 husband sent to him, his bank box, draft for the money on deposit, photographs and several barrels and boxes of household goods.

The letter is the same attached hereto, marked "Exhibit A" and came in the envelope hereto attached, marked "Exhibit B" which letter and envelope are the same referred to by my husband in his deposition.

(Sg.) MEMIE E. BURBANK DE SILVA.

I further certify that the answers of the respective witnesses were written down by me, and said answers of the respective witnesses were then read over by me to them, and were signed by them, in my presence, as appears.

In testimony whereof I have signed my name and affixed my seal of office, at Rock Island, County of Rock Island, State of Illinois, this 10th day of August, A. D. 1910.

(Sg.) ALBERT HUBER,
Notary Public.

My commission expires July 9th, 1911.

Certificate of Notaryship.

STATE OF ILLINOIS,
Rock Island County, ss:

I, Henry B. Hubbard, Clerk of the County Court in and for said County, do hereby certify that Albert Huber, Esq., whose name is subscribed to the proof or acknowledgement of the annexed instrument in writing, was, at the time of taking such proof or acknowledgement, a Notary Public in and for said County, duly commissioned, sworn and acting as such and authorized to take the same; and further, that I am well acquainted with his handwriting, and verily believe that the signature to the said proof or
259 acknowledgment is genuine; and further, that the annexed instrument is executed and acknowledged according to the laws of the State of Illinois.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Rock Island, in said County, this 10th day of August, A. D., 1910.

[SEAL.] (Sg.) HENRY B. HUBBARD, *Clerk.*

Certificate of Secretary of State.

UNITED STATES OF AMERICA,
State of Illinois, ss:

OFFICE OF SECRETARY OF STATE.

I, James A. Rose, Secretary of State, do certify that Albert Huber was on the 9th day of May, A. D., 1907 appointed and commissioned a Notary Public in and for the County of Rock Island State of Illinois, residing in the City of Rock Island, and that as such, full faith and credit is and ought to be given to his official attestations for the Term of Four Years from said 9th day of May, A. D. 1907.

In testimony whereof I hereunto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 10th day of August, A. D. 1910.

(Sg.) JAMES A. ROSE,
[SEAL.] *Secretary of State.*

260 EXHIBIT "A"' (LETTER ATTACHED TO DEPOSITIONS).

TEMPLE, TEXAS, *March* 4, 1910.

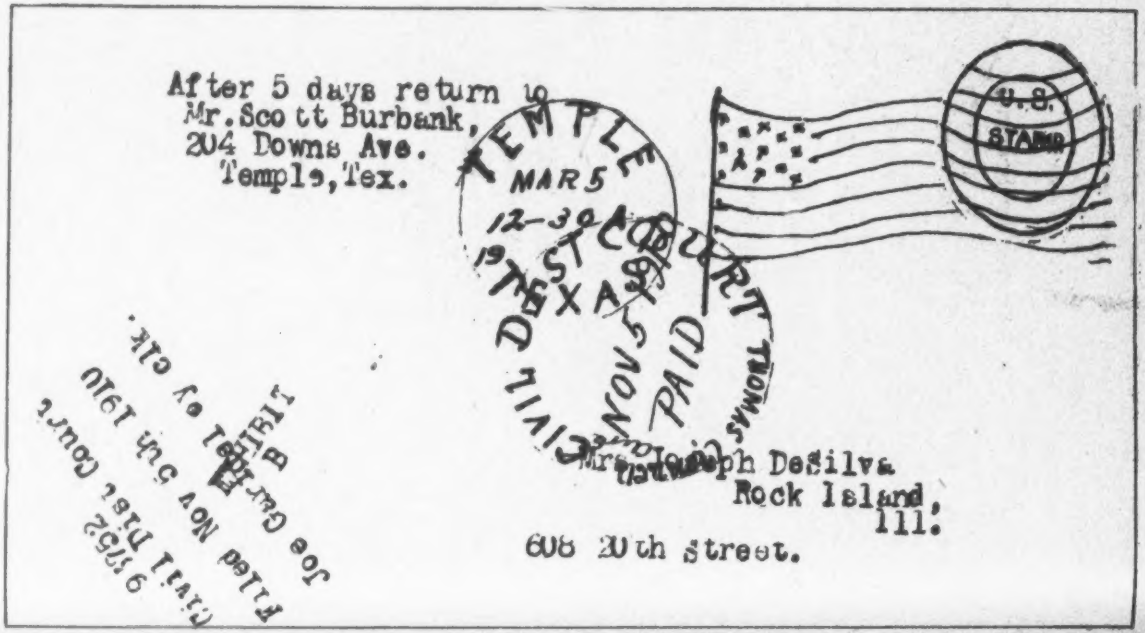
Mrs. Mimmie Burbank De Silva, Rock Island, Ill.

DEAR MIMMIE: I intend to make this my home, so you can send me my bank box and money that I have there, also the photographs that are in my room. Send the bank box by express and the key by registered mail. I like it very well down here and feel better since I came.

With love to all of you, I am
Yours truly,
(Sg.) T. SCOTT BURBANK.

EXHIBIT "B" (ENVELOPE).

Filed November 5, 1910.



261 *Proceedings Appointing Guardian in Texas (Exemplified Copy) Offered in Evidence.*

Filed November 7th, 1910.

Order Appointing Temporary Guardian.

In the County Court, Bell County, Texas, Sitting in Matters of Probate.

In Re Estate of Mary Springer Burbank, a Minor.

Be it known, that it having been made appear to me, the County Judge of said Bell County, being the Judge of said Court, and it appearing to me that Mary Springer Burbank is a minor under the age of fourteen (14) years; that she is a citizen of the State of Texas, and resides and has her legal domicile in the County of Bell in the State of Texas, and that she has an estate consisting of personal property, a portion of same situated in the County of Bell and State of Texas, and a portion of same consisting of real estate and other property, situated in other States; and that the interest of said minor requires immediate appointment of a guardian of her estate, and it appearing to the court that W. S. Rowland, a citizen of the State of Texas, who resides and has his domicile in the County of Bell and State of Texas, is a suitable person, to be appointed temporary guardian of the estate of said minor, she the said minor, already having appointed a guardian of her person.

Wherefore it is ordered and adjudged by said Court, and by me, W. S. Shipp, the Judge thereof, being the County Judge of said Bell County, that said W. S. Rowland, be, and is hereby appointed temporary guardian of the estate of said minor, Mary Springer Burbank, under the provisions and as authorized by the laws of the State of Texas, and as in such cases made and provided; and that unless said appointment of said Rowland as such temporary guardian, is contested at the next regular term of this Court
262 after service of citation, said appointment of said Rowland as temporary guardian, shall be made permanent and he shall be permanent guardian of the estate of such minor, Mary Springer Burbank.

It is further ordered that the bond of said W. S. Rowland as temporary guardian of the estate of said minor, Mary Springer Burbank, be, and is hereby fixed at the sum of Ten Thousand ($10,000.00) Dollars.

It is further ordered that upon said Rowland executing said Bond and taking the oath required by law, that the Clerk of this Court at once issue to him, letters of temporary guardianship of the estate of said minor, Mary Springer Burbank.

It is further ordered that this order, as well as all the other proceedings had and to be had herein, be entered of record in the probate minutes of this Court, and that the Clerk of this Court issue citation as is in such cases made and provided.

Done in open Court in Belton, Texas, this 22nd day of June, A. D., 1910.

W. S. SHIPP,
County Judge of Bell County, Being the Judge of said Court.

Bond and Oath.

THE STATE OF TEXAS,
County of Bell:

ESTATE OF MARY SPRINGER BURBANK, a Minor, Pending in County Court, Bell County, Texas.

Know all men by these presents, that we W. S. Rowland, as principal, and the other subscribers hereto as sureties, are bound to the Honorable W. S. Shipp, as County Judge of Bell County, and his successors in office, in the sum of ten thousand ($10,000.00) dollars, conditioned that the said W. S. Rowland will faith-
263 fully discharge the duties of temporary guardian of the estate of Mary Springer Burbank, a Minor.

Witness our hand, this 22nd day of June, A. D., 1910.

W. S. ROWLAND.
CHAS. M. CAMPBELL.
A. J. JARRELL.
J. M. WOODSON.

The foregoing Bond approved this 22nd day of June, A. D. 1910.

W. S. SHIPP,
County Judge of Bell County, Texas.

THE STATE OF TEXAS.
County of Bell:

I, W. S. Rowland, do solemnly swear that I will faithfully discharge the duties of temporary guardian of the estate of Mary Springer Burbank, a minor, according to law.

(Sg.) W. S. ROWLAND.

Sworn to and subscribed before me this 22nd, day of June, 1910.

LEONARD CARLISLE,
Notary Public, Bell County, Texas.

Filed June 22nd, 1910, Hugh Harris, County Clerk, Bell County, Texas, by C. K. White, Deputy.

Order Approving Oath and Directing Letters.

IN RE ESTATE OF MARY SPRINGER BURBANK, a Minor.

In County Court, Bell County, Texas, Sitting in Matters of Probate.

On this 22nd, day of June, 1910, came W. S. Rowland, heretofore appointed temporary guardian of the estate of Mary Springer Bur-

bank, a Minor, and presented his Bond as such temporary
264 guardian in the sum fixed by the Court, to-wit:—Ten Thousand ($10,000.00) Dollars, and it appearing to the Court that said bond is in due form and is payable as the law requires, and it is executed by said guardian and two or more sureties as the law requires, and that said sureties are amply sufficient, solvent and satisfactory to the court; it is ordered that said Bond be, and is hereby approved; and said W. S. Rowland having also on this date taken the oath required by law and filed the same herein, and has fully qualified in all things as such temporary guardian of the estate of Mary Springer Burbank, as is required by law, it is ordered that said Bond is approved, and the Clerk of this Court will issue immediately to said W. S. Rowland, letters as temporary guardian of the estate of Mary Springer Burbank, a Minor.

It is further ordered that this order, said Bond and said Oath, and all other orders and proceedings herein be by the Clerk of this Court duly entered of record in the Probate Minutes of this Court.

Done in open Court at Belton, this 22nd, day of June, 1910.

W. S. SHIPP,
County Judge of Bell County,
Being the Judge of said Court.

Letters of Guardianship.

In County Court, Bell County, Texas, June Term, A. D. 1910.

THE STATE OF TEXAS,
County of Bell:

I, Hugh Harris, Clerk of the County Court of Bell County, Texas, do hereby certify that on the 22nd day of June, A. D. 1910, W. S. Rowland was duly appointed by said Court Temporary Guardian of the estate of Mary Springer Burbank, and that he qualified as such on the 22nd day of June, A. D. 1910 as the law
265 required.

Given under my hand and seal of office, at Belton, Texas, this 22nd day of June, A. D. 1910.

[SEAL.]

HUGH HARRIS,
Clerk County Court, Bell County, Texas,
By C. K. WHITE, *Deputy.*

Certificate of Clerk of County Court.

THE STATE OF TEXAS,
County of Bell:

I, Hugh Harris, Clerk of the County Court of Bell County, Texas, same being a court of record and having a seal, do certify that the foregoing five pages, contain, and constitute and are a true and correct copy of the order of the Honorable W. S. Shipp, County

Judge of Bell County, being the Judge of said Court, appointing W. S. Rowland, temporary guardian of the estate of Mary Springer Burbank, and fixing his bond and also true copy of said Bond and the Oath of said temporary guardian, and the Order of the Court approving said bond, and directing letters of Testamentary guardianship to issue, and also copy of said letters and all orders had, and made in said cause; and that the same contains all the proceedings had and done in said cause, and that the same are duly entered of record in the Probate Minutes of said Court.

Attest: Hugh Harris, Clerk of the County Court, Bell County, Texas.

Given under my hand and seal of said Court, at Belton, Texas, this 22nd day of June, A. D. 1910.

(Sg.) HUGH HARRIS,
[SEAL.] *Clerk County Court, Bell County, Texas.*

266 THE STATE OF TEXAS,
County of Bell:

I, W. S. Shipp, County Judge of Bell County, in the State of Texas, being Judge of the County Court of said County, same being a Court of Record, and having a seal, do certify that the said Hugh Harris is the Clerk of the County Court of Bell County, Texas, and that the foregoing certificate attested and made by him, is in due form and is signed and attested by the genuine signature of said Hugh Harris.

To certify all of which, witness my official signature with the seal of said court attached, at Belton, Texas, this 22nd day of June, 1910.

(Sg.) W. S. SHIPP,
County Judge, Bell County, Texas.

THE STATE OF TEXAS,
County of Bell:

I, Hugh Harris, Clerk of the County Court, of Bell County, Texas, do hereby certify that the foregoing certificate signed by W. S. Shipp, Judge of the County Court of Bell County, Texas, is subscribed by his genuine signature, and that said W. S. Shipp, is County Judge of said Bell County, being the Judge of said Court.

Attest:
HUGH HARRIS,
Clerk of the County Court of Bell County, Texas.

Given under my hand and seal of said Court at office in Belton, this 22nd day of June, 1910.

[SEAL.] HUGH HARRIS,
Clerk County Court, Bell County, Texas.

267 *Proceedings for Confirmation and Appointment of Guardian of Property, etc., Offered in Evidence.*

Filed November 7, 1910.

Notice of Application for Letters.

Guardianship.

The State of Texas to the Sheriff or any Constable of Bell County, Greeting:

You are hereby commanded to cause to be posted (for ten days exclusive of the day of posting before the return day hereof) in three of the most public places in Bell County, one of which shall be the court house door, and no two of which shall be in the same city or town, copies of the following notice:

The State of Texas to all persons interested in the welfare of Mary Springer Burbank, a minor.

Whereas, the County Court of Bell County, Texas, on the 22nd day of June, 1910, appointed W. S. Rowland temporary guardian of the estate of Mary Springer Burbank, a minor, and whereas the said appointment will be made permanent unless successfully contested, at the next term of said court, commencing the First Monday in August, A. D. 1910, at the Court House thereof, in the City of Belton, at which time all persons interested in the welfare of such minors may appear and contest such order, should they desire to do so.

Herein fail not, but have you then and there before said Court this writ, with your return thereon endorsed, showing you have executed the same.

Given under my hand, and the seal of said Court, at office in Belton, this 22nd day of June, A. D. 1910.

[SEAL.]

HUGH HARRIS,
Clerk of County Court, Bell County.
By C. K. WHITE, *Deputy.*

268 In County Court, Bell County Texas, Sitting in Matters of Probate.

No. 789.

In Re Estate of Mary Springer Burbank, a Minor.

November 4, 1910.

In said cause in this Court, W. S. Rowland was heretofore on the 22nd day of June, 1910, by an order duly made and entered and of record in this Court, appointed temporary guardian of the estate of

Mary Springer Burbank, a minor, and in all things qualified in accordance with law and to the satisfaction of the Court and his qualification shown by order of court duly entered in the minutes of said court and in accordance with the requirements statutes of the State of Texas in such cases made and provided, notice of such appointment was duly issued and certified by posting for the full length of time and in the manner and in all things as required by law and being provided by the statutes of the State of Texas, and being also recited and expressed in the order appointing said Rowland such guardian, that in case said appointment was not contested at the next regular term of said Court after service of citation, the same should be made permanent.

Whereas, said next regular term of said court after said appointment and citation is now in session and no contest of said appointment has been made whatever and said appointment has not been contested in any manner, particular or form and said Court being now in session and open and it being a regular session of said court, it is therefore ordered by the court that said appointment of said W. S. Rowland, Guardian of the estate of said Mary Springer Burbank, a minor, is now made permanent and that he be and is permanent guardian of the estate of said Mary Springer Burbank and that said W. S. Rowland is in all things and respects and in all forms required by law, qualified as Guardian of the Estate of said Mary Springer Burbank.

269 THE STATE OF TEXAS,
County of Bell:

I, Hugh Harris, being Clerk of the County Court of Bell County, in the State of Texas, the same being a Court of Record and having a seal, do hereby certify that the foregoing copy of notice of application for Letters of Guardianship and the foregoing copy of an order of court made and entered on the 4th day of November, 1910, and in said Court making the appointment of W. S. Rowland, Guardian of the estate of Mary Springer Burbank, a minor, permanent, are true and correct copies of said citation and said order, same being records of said court in said cause.

Attest:
HUGH HARRIS,
Clerk of the County Court of Bell County, Texas.

Given under my hand and seal of said court at Belton, this 4th, day of November, A. D. 1910.

(Sg.) HUGH HARRIS,
[SEAL.] *Clerk County Court, Bell County, Texas.*

THE STATE OF TEXAS,
County of Bell:

I, W. S. Shipp, County Judge of said Bell County, being the Judge of the County Court of said Bell County, the same being a Court of Record and having a seal, do certify that the foregoing certificate and

attestation made by Hugh Harris, Clerk of said Court, in the matter of the estate of Mary Springer Burbank, a minor, is in due form and that the signature of the said Hugh Harris is his genuine signature.

Attest:

W. S. SHIPP,
County Judge of said Bell County,
Being the Judge of said Court.

Given under my hand and seal of said Court this the 4th,
270 day of November, A. D. 1910.

(Sg.) W. S. SHIPP,
[SEAL.] *County Judge of said Bell County, Texas.*

THE STATE OF TEXAS,
County of Bell:

I, Hugh Harris, Clerk of the County Court of said Bell County, same being a court of Record and having a seal, do certify that the foregoing certificate and attestation made by Hon. W. S. Shipp, County Judge of said Bell County, he being the Judge of said Court, in the matter of the estate of Mary Springer Burbank, a minor, in the act and deed of said Judge and is in due and regular form and his signature thereto is the genuine signature of said W. S. Shipp, County Judge, as aforesaid, being Judge of said Court.

Attest:

HUGH HARRIS,
Clerk County Court of Bell County, Texas.

Given under my hand and seal of said Court this 4th day of November, A. D., 1910.

(Sg.) HUGH HARRIS,
[SEAL.] *Clerk, County Court, Bell County, Texas.*

Procuration to A. E. Billings (Copy) Offered in Evidence by Mrs. Josephine Ernst, Legal Tutrix.

Filed November 10th, 1910.

UNITED STATES OF AMERICA.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

April 8th, 1909.

Procuration to Alfred E. Billings.

271 By this Instrument of Procuration, be it known, that on this eighth day of the month of April in the year of our Lord, one thousand and nine hundred and nine, and of the Independence of the United States of America, the one hundred and thirty third:

Before me, Frank Soule, a Notary Public, duly commissioned and qualified in and for the Parish of Orleans, State of Louisiana, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared, Thomas Scott Burbank, a resident of this city, of legal age, and Memie E. Burbank, wife of Dr. Joseph De Silva, a resident of Illinois, of legal age, in their capacity as Testamentary Executors in the succession of Edward W. Burbank, No. 88241 of the Civil District Court for the Parish of Orleans, wherein Nellie G. Burbank, wife of William R. Dodge, is also one of the executors.

Who declared: that being about to absent themselves temporarily from the State of Louisiana, and in order to comply with the law in such case made and provided, and especially with Article 1154 of the Revised Civil Code of said State, they and each of them have hereby constituted and appointed, Alfred E. Billings, a resident of the Parish of Orleans, State of Louisiana, of legal age, and by these presents, constitute him, said Alfred E. Billings, to be their true and lawful attorney in fact, general and special, giving, and by these presents, granting unto the said attorney in fact full power and authority for them and each of them and in their and each of their names and behalf, and to their and each of their use, to conduct, manage and transact all and singular their and each of their affairs, business and concerns as Executors in said Succession of whatever nature or kind, without any exception or reservation whatsoever; to

272 deposit drafts, bills of exchange, acceptances and promissory notes or other obligations, for collection in any Bank or Banks; to lease, let or hire all or any part of the real estate belonging to the said Succession and receive and receipt for the rent thereof as the same shall fall due, and for the full execution of the purposes aforesaid, to make, sign, and execute in the name of the said Executors all acts of lease that shall or may be requisite or necessary, and bind the said succession and executors herein thereby as firmly as if same were or had been their or either of their own proper acts and deeds; and to act for the said appearers and either of them, and to ask, demand, have, take, and by all lawful ways and means to recover and receive of and from all and every person and persons whomsoever, body or bodies corporate, all and every such sum or sums of money, goods, debts, property and effects whatsoever, as now is or are or may hereafter be in his, or her or their custody or possession, due, owing, coming or belonging to said Succession, whether by bonds, bill, note, book-kept, account, consignment, bequest, or for and by what other reason or means soever; and to that end with whom it may concern, to adjust and settle all accounts, and upon recovery and receipt in the premises to make and give good and sufficient discharges and acquittances; to appear before all Courts of Law and Equity there to do, prosecute and defend as occasion shall require, or to compromise, compound, and agree in the premises, by arbitration or otherwise, as the said attorney shall in his discretion think fit; also to apply for and obtain all and any attachments, sequestrations, injunctions, and appeals, give the requisite security and sign the necessary bonds.

And generally to do and perform all and every act, matter, and thing, whatsoever, as shall or may be requisite and necessary touching or concerning the affairs, business and concerns of the said Succession as fully, amply and effectually, and to all intents and
273 purposes with the same validity, as if all and every such act, matter or thing, were or had been particularly stated, expressed, and especially provided for, or as said appears herein, or either of them, could or might do if personally present; also with full power of substitution and revocation; and the said appearers and each of them, hereby agree to ratify and confirm all and whatever the said attorney shall lawfully do or cause to be done by virtue of this act of procuration.

And now, also intervened herein, the said Dr. Joseph De Silva, of legal age, who declares that he does hereby authorize his said wife to sign and execute the foregoing power of attorney.

Thus done and passed, in my office at the City of New Orleans on the day, month and year herein first above written in the presence of Chas. S. Rice and Geo. Kronenberger, competent witnesses, who hereunto sign their names with the said appearers and me, Notary, after reading of the whole.

T. SCOTT BURBANK.
MEMIE E. BURBANK DE SILVA.
DR. JOSEPH DE SILVA.
FRANK SOULE, *Not. Pub.*

(Original Signed.)

CHAS. S. RICE.
GEO. KRONENBERGER.

Recorded in the Mortgage Office, Book No. 564 Fol. No. 281.
New Orleans, La., April 8, 1909.
[SEAL.] (Signed.) EMILE LEONARD, *D. R.*

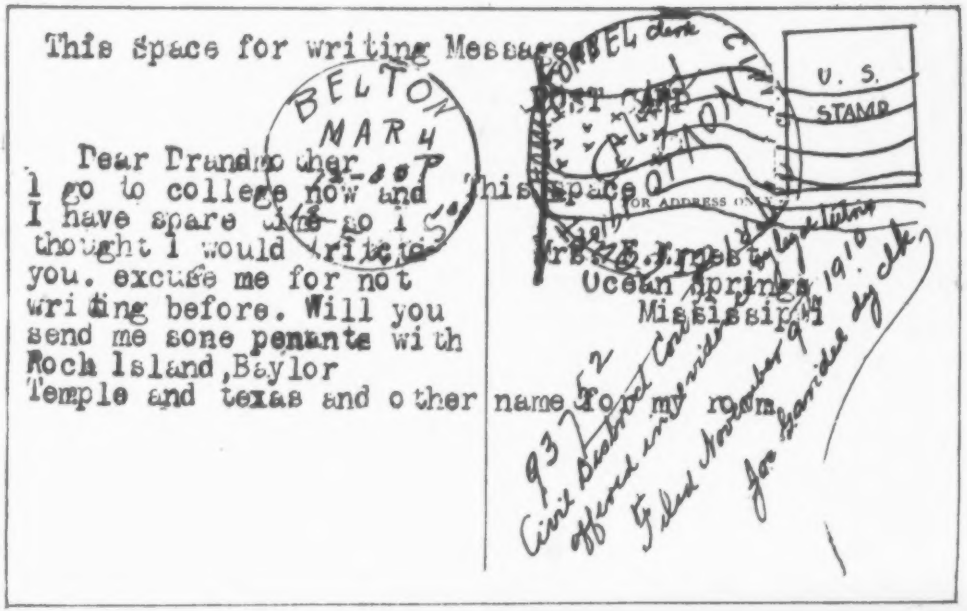
I hereby certify that the foregoing is a true and correct copy of the original power of attorney on file and of record in my Notarial Office.

In Faith whereof, witness my hand and official seal this 2nd day of June, 1910.

(Signed.) FRANK SOULE,
[SEAL.] *Not. Pub.*

274 *Post Card (From Mary Springer Burbank to Her Grand Mother) Offered in Evidence by Counsel for Tutrix.*

Filed November 9th, 1910.


This Space for writing Messages

BELTON MAR 4

Dear Grandmother I go to college now and I have spare time so I thought I would write to you. excuse me for not writing before. Will you send me some penants with Rock Island, Baylor Temple and Texas and other name for my room.

This Space for Address only

U. S. STAMP

Ocean Springs Mississippi

93 52
Civil District Court
Offered in evidence
Filed November 9 1910
for identification
by Clk

Letter (Addressed to "Dear Marion" and Signed by Mary Burbank) Offered in Evidence by Counsel for Tutrix.

Filed November 10th, 1910.

DEAR MARION: How are you to day. I think this is the first letter you received I do not know. Will you please do something for me and that is Tell your mother to write to me and keep after her till she writes if she does not give her a spanking like I would do if I was there. How do you like Ocean Springs and have you ever been in bathing I surely would like to be there to go in bathing and catch crabs and I want you to be very careful for those great big old crabs will bite off your little pink toes and that will make me cry because you have only nine pink toes. Obey Lulu or else she will spank you and that will make poor little Marian cry because I am not there to keep her from spanking you and you also will lose some of those crystal tears and crystal cost plenty of money now days, so be careful for I am not there. I know you will think that this letter is mighty funny for it is written by some one who you don't know. With lots of love to all the family and also a great big hug big enough to sque-ze you up from your cousin.

(Sg.) MARION BURBANK.

Letter (Copy) Dated May 18th, 1910, Addressed to Charles S. Rice and Signed by Dart, Kernan & Dart, Offered in Evidence by Tutrix.

Filed November 10th, 1910.

MAY 18TH, 1910.

Mr. Chas. S. Rice, City.

DEAR SIR: Supplementing our previous letter of to-day to you in the matter of the Burbank Succession, we would ask if you have any objection to our having a copy of the Burbank Will made in Louisiana. We will tell you very frankly at this time that our interest will probably be opposed to yours as we represent the grandmother of the child, who is looking after the welfare of the child. But of course we cannot advise her or do anything in the matter one way or the other until we have seen the will left by Scott Burbank.

Yours very truly,

(Sg.) DART, KERNAN & DART.

W. K. D.

276 *Letter (Copy Dated May 18th, 1910 Addressed to Messrs. Rice and Montgomery and Signed by Dart, Kernan & Dart) Offered in Evidence by Counsel for Tutrix.*

Filed November 10th, 1910.

MAY 18TH, 1910.

Messrs. Rice & Montgomery, Morris Building, City.

GENTLEMEN: We are returning the record in the Succession of Burbank and we thank you for sending it to us.

We would esteem it a favor, provided you can perceive no legal objections thereto, letting us have a copy of the Texas will made by Scott Burbank. Of course if you would prefer not to allow us to have a copy of this will when you obtain, we will understand your position.

Very Truly Yours,

(Sg.) DART, KERNAN & DART.

W. K. D.

Record returned by bearer.

Letter (Dated May 18, 1910, Addressed to Dart, Kernan & Dart and Signed by Rice & Montgomery) Offered in Evidence by Counsel For Tutrix.

Filed November 10th, 1910.

NEW ORLEANS, LA., *May* 18, 1910.

Messrs. Dart, Kernan & Dart, 841 Maison Blanche, City.

277 GENTLEMEN: We hand you herewith record in Succession of Burbank Will you kindly return it to us as soon as you have completed your examination. For your information, we would say that Scott Burbank before he left the City, rather more than a year ago, made a will. In it he named a tutor for his minor child; but subsequently, in Texas, we are informed, that he made another will, the contents of which we do not know, but have sent for a copy.

Very respectfully,

(Sg.) RICE & MONTGOMERY.

Agreement to Transfer Certain Stock, Offered in Evidence By Counsel for Mrs. Ernst.

Filed November 10th, 1910

CITY OF NEW ORLEANS,
Parish of Orleans:

This agreement and contract made and entered into this 20th, day of March, 1909 between Edward P. Munson of the Parish of As-

sumption, hereinafter called party of the first part, and Mrs. Memie Burbank, wife of Dr. J. De Silva, herein represented in a legal way, her said husband authorizing her, residents of the State of Illinois, and also Mrs. Anna Burbank, wife of Dr. James Woodson, residents of the State of Texas, the said Dr. James Woodson herein authorizing his said wife, and T. Scott Burbank, a resident of the City of New Orleans, the last named three, hereinafter called, parties of the second part, witnesseth:

That in consideration of the parties of the second part herein binding themselves to turn over to the said Edward P. Munson,
278 just as soon as they are placed in possession of same, three hundred and thirty six shares of the capital stock of the Magnolia Planting Co. Ltd., which are hereby declared to be sold to the said Munson just as soon as the transfer will be made on the Book of the Corporation in the name of said Munson, and in addition to said parties of the second part binding themselves to sell and turn over to said Munson in addition to the above mentioned stock, two additional shares of the capital stock of said Co. if they can possibly obtain possession of same.

The said Munson promises and agrees to pay to said parties of the second part upon the delivery to him of the aforesaid stock, the par value of said stock so to be delivered, being one h-ndred dollars per share; said payment to be made as follows, to-wit:—

Eleven thousand two hundred and fifty dollars cash to be prorated among the parties of the second part in proportion to their ownership in the aforementioned stock; and that the said Edward P. Munson will give his nine promissory notes for the unpaid balance for said stock in the sum of twenty five hundred dollars each, three to be payable one year from date of delivery of said stock, three payable two years from date and three payable three years from date; all of said notes to bear 8% int. from date until paid, interest payable annually; and said notes to be signed and endorsed in blank by said Edward P. Munson and to be secured by a pledge of the stock to be delivered to him, until the full and final payment of said notes.

It is well understood and agreed that this agreement of the part of the parties of the second part to sell the aforedescribed property and the said Edward P. Munson to buy the same, shall be binding in court of law or equity, with the exception of the additional shares above mentioned, of two shares.

(Signed) E. M. MUNSON.
T. SCOTT BURBANK.
MRS. MEMIE BURBANK DE SILVA.
DR. JOSEPH DE SILVA.
ANNA BURBANK WOODSON.
DR. J. M. WOODSON.

279 *Citation of Nellie G. Dodge, Wife of William R. Dodge and William R. Dodge, Her Husband, and Sheriff's Return Thereon.*

Filed October 27, 1910.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Nellie G. Burbank, Wife of William R. Dodge, and William R. Dodge, Her Husband, 1630 Valmont, New Orleans, La:

You are hereby summoned to comply with the demand contained in the petition of which copy accompanies this citation, or deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after the service hereof.

Witness the Honorable T. C. W. Ellis, Fred D. King, Geo. H. Theard, W. B. Sommerville, E. K. Skinner, Judges of the said court, this 24th., day of October, in the year of our Lord, 1910.

(Sg.) J. G. LYNCH,
Deputy Clerk.

New Court House, Royal & Conti Sts.

Sheriff's Return.

Received Monday Oct. 24, 1910 and on the 25th., day of October, 1910, I served a copy of the within citation and accompanying petition on Nellie G. Burbank, wife of William R. Dodge and William R. Dodge, her husband, defendants herein, by leaving the same at their domicile No. 1630 Valmont Street in the
280 hands of Mrs. Nellie G. Burbank, wife of William R. Dodge, one of said defendants, a person apparently over the age of 14 years, living and residing in said domicile whose name and other facts connected with this service I learned by interrogating said Mrs. Nellie G. Burbank, wife of William R. Dodge. The said William R. Dodge being absent from his domicile at time of said service.

Returned same day.
Sheriff's fees $1.50.
(Sg.) J. J. OLIVER,
Deputy Sheriff.

Answer of Mr. and Mrs. William R. Dodge to the Petition of Mrs. Josephine Ernst, Legal Tutrix.

Filed November 4, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Now into Court comes Mrs. Nellie G. Burbank, wife of William R. Dodge, and the said William R. Dodge, her husband, to aid, authorize and assist her and for answer to the petition of Mrs. Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank, denies all and singular the allegations thereof, except such as may be herein specially admitted.

For further answer, respondent believes that the instrument purporting to be the last will and testament of her deceased brother, T. Scott Burbank, made in Temple, Bell County, Texas, is not in truth and fact his last will and testament and was not made by him understandingly, and respondent further believes that if the said T. Scott Burbank had understood the full purport
281 and meaning of the said writing, he would not have made or subscribed to the same.

For further answer respondent admits and alleges that her said brother, T. Scott Burbank was a citizen of the State of Louisiana, and a resident of the City of New Orleans, where he had his legal domicile at the time of his death; that when he left the said City of New Orleans about the month of March, 1909, he intended such absence to be merely temporary, and that he left the said City of New Orleans with the purpose and intention of returning thereto, and without any intention or purpose of surrendering his domicile in the said City of New Orleans, or of acquiring a domicile elsewhere, and respondent alleges that the said T. Scott Burbank did not acquire or intend to acquire a domicile in the State of Texas, or in any other State, but, on the contrary intended to and in fact did retain his domicile in the City of New Orleans.

For further answer respondent alleges that the said T. Scott Burbank was one of the co-executors of the last will and testament of the late E. W. Burbank, whose succession was duly opened in the Court under proceedings No. 88241 of the docket thereof, respondent and her sister, Mrs. Memie E. De Silva being likewise executors of the said last will and testament; that when the said T. Scott Burbank left the City of New Orleans about March 9th, 1909, he left a power of attorney or procuration appointing Hon. E. A. Billings as his agent and attorney in fact as such co-executor of the estate of the said E. W. Burbank and respondent thereafter acted in conjunction with the said A. E. Billings as such Agent and Attorney in fact of the said T. Scott Burbank, and also with the said T. Scott Burbank and the other co-executors in administering the

estate of the said E. W. Burbank; that the said T. Scott Burbank could not and would not have retained his office and trust as executor of the estate of the said E. W. Burbank had he left
282 the City and State permanently or had he acquired a domicile elsewhere; that had respondent known or had she had any intimation that the said T. Scott Burbank had left this State Permanently or had acquired a domicile elsewhere, respondent could not properly have treated with him as executor of the estate of E. W. Burbank, and respondent would not have done so; that respondent does not believe and therefore denies that her deceased brother would have been guilty of violating the law, or of imposing upon this court by retaining his office and trust as executor of the last will and testament of the late E. W. Burbank if he had left this State permanently, or had acquired or intended to acquire a domicile elsewhere.

For further answer respondent admits and alleges that the estate of T. Scott Burbank is legally located and situated in the City of New Orleans, and that the vast bulk of the estate is actually located and situated in the City of New Orleans, and under the jurisdiction of this court, and that it is to the best interest of the minor, Mary Springer Burbank, that the said pretended last will and testament of T. Scott Burbank be annulled and set aside.

Wherefore respondent prays that after due trial this court render such judgment as to it may seem proper and right under all the circumstances of the case, and for all equitable and general relief.

(Sg.) J. ZACH SPEARING, *Att'y.*
MRS. NELLIE G. BURBANK DODGE.
W. R. DODGE.

Opinion.

Filed November 28th; 1910.

283 Civil District Court, Division "C".

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

This case involves in part the Succession of T. Scott Burbank, and the tutorship to his sole and only heir at law, Mary Springer Burbank.

The Record is as follows:

Mrs. Nellie G. Burbank, wife of W. R. Dodge, on June 6th, 1910, filed in this Court, a petition setting forth that her brother, T. Scott Burbank died in Temple, Texas, on the 10th day of May, 1910, his wife having died previously, and that he left as heir the minor child named above.

The petition further sets forth that the deceased was one of the executors of the estate of the late, E. W. Burbank and was domiciled in this city; that his death rendered necessary the appointment of a Tutor, so that the settlement of the estate of Burbank, Sr., could be proceeded with.

On the 10th, of June, Mr. C. S. Rice, later the attorney for certain interests herein appeared as Amicus Curiae and gave the Court notice

that T. Scott Burbank had established his domicile in the State of Texas, had made a will there, appointed a guardian there, and that said will had been or shortly would be probated there, and would be sent here for further proceedings, according to law, and hence that this court was without jurisdiction to appoint a tutor or tutrix.

On the same day, Mrs. Josephine Ernst, grandmother of the minor, Mary Springer Burbank, filed a rule opposing the application of Mrs. Nellie G. Burbank Dodge for appointment as tutrix; this rule was tried on June 17th., 1910, Mr. Spearing for defendant in rule, and Mr. Rice appearing as Amicus Curiae.

There was judgment appointing Mrs. Josephine Ernst as
284 tutrix.

On June 14th, 1910, there was filed a homologated *and* inventory of the estate of T. Scott Burbank, showing his entire estate to consist of his interest in the Succession of E. W. Burbank, his father, and appraising his interest at $100,000.00.

On the same date a family meeting held before W. McL. Fayssoux, recommended Mrs. Josephine Ernst, the grandmother as tutrix and W. R. Dodge as under-tutor of the Minor, Mary Springer Burbank, Mr. C. S. Rice, atty. for Dr. and Mrs. J. M. Woodson (nee Burbank) filed a protest to the holding of said family meeting.

The protest as well as the opposition of Mrs. Nellie G. Burbank Dodge, was disposed of, on the trial of the rule on June 17th., when Mrs. Josephine Ernst was appointed tutrix. On the 20th., June, 1910, there was filed and homologated a second inventory of the estate of T. Scott Burbank, giving more in detail the items of the estate of E. W. Burbank and showing the value of the interest of T. Scott Burbank to be $100,225.

On June 20th, 1910, Mrs. Ernst took her oath as tutrix, and on the 21st. letters issued to her.

On June 27th, 1910, Mrs. Josephine Ernst, the qualified tutrix, filed a petition for a Habeas Corpus directed to James M. Woodson and his wife, Anna M. Burbank, to produce the body of the minor, Mary Springer Burbank. Service was personal on both of these defendants, but the matter was contested and this court took it under advisement for determination later.

On the 22nd. June, 1910, Messrs. Rice & Billings filed in this Court a petition of the Texas Executors to be recognized as such in this State, having been so recognized in Texas, and they
285 annex to their petition a copy of the proceedings in the Texas Court, exemplified under the act of Congress and pray for authority to administer the estate of T. Scott Burbank &c., &c.

On the same date Mrs. Josephine Ernst filed an answer making an appearance and denying the right of the Texas Executors to the relief prayed for.

On the 23rd, June the court ordered that the exemplified will be filed simply, and that further action be deferred until a future hearing.

On the 27th. of June, Mrs. Josephine Ernst, the tutrix of the minor child filed a petition assailing the validity of the will tendered and set forth in the exemplified copy.

On the 15th. of July, the Texas Executors filed an answer specially and generally denying the allegations of the petition of Mrs. Ernst of July 27th, and affirming the validity of the will and of all of the proceedings of the Texas Court.

Nov. 4th., 1910, Mrs. Nellie G. Burbank Dodge, filed an answer, in effect, co-inciding with Mrs. Ernst.

Mrs. Ernst prayed that the will propounded herein be annulled:

1. Because the domicile of T. Scott Burbank at the time of the making of the will and at the date of his death was in this State and not in Texas.

2. That his estate in Louisiana is immovable by effect of law and is not affected by the Texas Will even if valid, and descends to him at law as provided by our Code.

3. That the Texas will be declared null and void as in violation of the public policy and settled rule of this state concerning trusts, substitutions and fidei commissa.

4. That the demand of the Texas Executors for probate of the will tendered and delivery of the Louisiana estate be denied for the same reason.

286 5. That the right to the custody of the child be determined in these proceedings.

A determination of the first point would settle the other questions but the court considers that it would be well to pass on the other points as well.

In relation to such instruments as the will herein, our law provides—C. C. Art. 10.

"The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed. But the effect of Acts passed in one County to have effect in another county where each acts are to have effect."

By the third paragraph of this article, the movables of a testator domiciled out of this State are exempted from the operation of the Second paragraph.

This movable property of a non-resident can be disposed of mortis causa, as the testament of the non-resident deceased indicates, but immovables can only be disposed of according to the laws of this State. C. C. Art. 491 expressly provides "Persons who reside out of the State, cannot dispose of the property they possess here, in a manner different from that prescribed by its laws." Excepting movable property under C. C. Art. 10, and as provided in C. C. Art. 1596. That the instrument be clothed with legal formalities where made.

10 A. 775.
11 A. 185.
14 A. 643-85.
21 A. 365.
14 A. 578.
3 A. 581.
15 A. 702.
109 La. 160.
105 La. 553-577.
45 A. 1249.

This line of jurisprudence affirms the right of a party
287 interest to contest the validity of the dispositions in a foreign will in our court, and I fail to find any provisions fixing the time when such opposition should be filed. There is no reason why it should not be made when the foreign will is tendered.

The inventories herein show that the only property owned in this State by T. Scott Burbank, consists of his right and interest in the estate of his father, E. W. Burbank, whose succession is still pending in this Court. This right of action is an immovable, under Art. C. C. 471 and under the above jurisprudence.

It is therefore, very clear that those clauses of the will creating substitutions and fidei commissa cannot be made effective in contravention of our law insofar as an immovable is concerned.

In circumstances somewhat like those existing in this case our Supreme Court refused to continue in their seizin the Executors charged with the execution of a will containing substitutions and fidei Commissa.

Succ. Beauregard, 49, A. 1176 where the matter is fully discussed with numerous citations of authorities.
Claqne vs. Claqne, 13 La. 2.
Succ. McCan, 48 A. 145.
Succ. Theurer, 38 A. 510.
Succ. Steven, 36 A. 754.
Succ. Cochran, 29 A. 232.
Succ. Foucher, 30 A. 107.

It is natural to assume that if the Texas Executors were recognized they would endeavor to reduce the immovable right of action of the minor Burbank to possession and that it would become a movable asset, which in due course could be transferred to a foreign jurisdiction where the will would be enforced and our law
288 rendered absolutely nugatory.

At any rate it would be their duty to do so as Executors under the Texas Laws and under the judgment of a Texas Court recognizing the validity of the dispositions contained in the will of T. Scott Burbank, and despite the will of T. Scott Burbank, which in its second clause constitutes his daughter his universal legatee and by subsequent provision establishes the substitutions and fidei commissa prohibited by our State and despite further that a minor under our law inherits instanter and with benefit of inventory the estate of a deceased parent. There is no hiatus in the ownership. The property now belongs absolutely to the minor.

The fifth clause of the exemplified will likewise contains three substitutions, one of one hundred dollars to Nellie Burbank Dodge and constituting his sisters, Mrs. De Silva & Mrs. Woodson heirs, each to ½ of the remainder of his estate.

Eliminating all of these illegal dispositions of the Texas will, insofar as it may effect the estate which in this case is immovable, there is nothing left of the will tendered to be executed in this State, except payment of certain insignificant debts.

The Court does not feel disposed to recognize the executors of a foreign will, whose duty, it is under the will to enforce or attempt

to enforce certain provisions thereof violative of the established policy of this State. Section Seven of the exemplified copy nominates Anna Burbank Woodson a paternal aunt as the guardian of the person of the minor, Mary Springer Burbank.

Proceedings filed herein show that she has qualified as such in Texas and has given bond in the sum of $500.00. Her husband, Mr. Woodson was nominated in the alternative.

Other proceedings indicate that W. S. Rowland, a resident
289 of the State of Texas was appointed, temporary guardian of the estate of Mary Springer Burbank, and gives bond in the sum of $10,000.00 as such.

The offer of an exemplified copy of the judicial proceedings, showing these facts was objected to on the ground that they raised matters not at issue.

They are not at issue but they serve to show that there is probably a considerable estate located in Texas, and liable to be affected by the will, which the probate indicates to be valid in that State.

It will be observed too, that the office of tutor is held in a devided way by a guardian of the person and a guardian of the estate. No such officers are known to our law.

The petition of Mrs. Ernst assails the will tendered averring that the domicile of T. Scott Burbank was and is in the City of New Orleans and should be annulled for that reason and for the further reason that T. Scott Burbank was mentally incapable of making a will. This second ground was practically abandoned in the argument, at any rate, the court dismisses the averment as not proven.

The only remaining question is regarding the legal domicile of the testator.

Burbank had established a domicile in this City but for some reason became tired of living in this city and unquestionably endeavored to make a change of domicile.

The motion which inspired this desire is of no concern provided he did actually, affirmatively and legally make a new domicile.

The motion may have been a mere whim or caprice or a special desire and intent to establish another domicile for the express purpose of evading the operation of the laws of this State upon his property.

290 This latter question was decided in the affirmative in the matter of the Succession of Mrs. Newcomb the benifactress of the Female Institute of that name in this City, she consulted counsel in the making the change of her domicile and her actions were subsequently affirmed by the Court.

Newcomb, 192 N. Y. C. of Appeal, p. ——?

But in the Suc. of Steers, 47 A. 1556 our Supreme Court indicates which is the domicile when the conflicting actions of the deceased are being considered. Steers was engaged in a business which required him to change his place of residence frequently. He established his domicile in the City but indicated that his ultimate intention- were to re-establish his old domicile in the State of New York, "His will was made before the death of his wife in Otsego, N. Y., in which he declared himself a resident of that county, and it

was probated then. But the probate was after the death of his wife, whose heirs contend that at the date of her death he was domiciled in New Orleans. He voted In Otsego, Co. 6th. Nov. 1888, and this act also was after the death of his wife," P. 1556.

These facts were held insufficient to establish a change of domicile. That Court proceeds further to say, p. 1558 "Having acquired a domicile in New Orleans, it is presumed to continue until it is shown to have been changed. The facts do not show that he acquired a new domicile in Otsego, Co. N. Y. It is not shown that he resided there with the intention of remaining permanently."

The evidence in this case shows that T. Scott Burbank became dissatisfied with his residence and domicile in this Parish. That in December, 1908 or the early part of 1909, he qualified as one of the executors of the estate of his father, which he continued to hold until his death in Texas, May 10th, 1910. This dissatisfaction was first actively shown by his shipping some movable property to Rock Island, Ill., and his declaration that he intended to establish
291 his domicile there, where his daughter was, and where his sister Mrs. De Silva lived.

But before leaving on that journey by Act before Frank Soule, Notary, he appeared and constituted Judge A. E. Billings, his atty. in fact and declared solemnly "that he was" about to absent himself temporarily from the State of Louisiana, and in order to comply with the law in such cases made and provided, and especially with Art. 1154 R. C. C. "he made the appointment. Later on Judge Billings entertaining some doubt about the exact power given him by the procuration transacted the business of the Executors, but made it a habit to send on the "Bank Checks" to Burbank for his own signature.

Scott Burbank left this City about the 9th of April, 1909.

However he did not actually establish his domicile in Illinois, but found the climate too vigorous, he left in Feby. 1909, for Bell Co., Texas, where his other sister, Mrs. Woodson lived, taking his daughter with him.

He there consulted counsel and on the 22nd of March, 1910, made the will in question and declared in paragraph 8, that his residence and permanent home (and therefore his domicile) was in Bell Co.

In April, 1910, the Supreme Court of this State decided advers-ly to his contentions a case involving his interest in the Succession of his father, E. W. Burbank.

Scott Burbank committed suicide on the 10th of May, 1910, and between that time and the making of the will, he industriously circulated by words his intention to make the town of Temple, Texas his domicile. Even indicating his purpose to build his home there, near his sister, Mrs. Woodson.

But all the while he held fast to his executorship, even to the extent of appearing in the Supreme Court of this State, where
292 it was held that he had not divested himself of his seizing as Executor, in a transaction which was up for determination.

It can hardly be said that his real bona fide intention was to

change his domicile in the face of what was almost a certain estoppel by his own act in our Court. His conduct in retaining the executorship by proper method and before and in authentic act is entitled to more weight, than scattered statements made indiscriminantly to and among strangers.

Without acting upon the objections to the reading of the answers to the interrogatories taken in Bell Co. Texas, the Court finds that the intention to change his domicile was not bona fide, clear, positive and beyond doubt. That his continued appearance as executor in the Courts of this State, and his intention to return when necessary, negative the idea that he would abandon his domicile and thereby his executorship.

Doubt in such a case is fatal to the proposed change.

For these reasons the court will decline to order the execution of the will propounded in Texas, exemplified copy of which is filed, and the application is hereby dismissed.

The minor Mary Springer Burbank, is not within the jurisdiction of the Court, nor is the guardian of her person. The Court is therefore powerless to execute an order directing the delivery of the child to the tutrix in this State. The Court will dismiss the writ reserving the right of the petitioner to again file the petition for a habeas corpus, under such conditions as make the writ possible of execution.

Judgment for opponent dismissing application to register and execute the will filed, and likewise dismissing the writ of opponent for habeas corpus with reservation as above.

293 *Judgment.*

Rendered November 28, 1910. Signed December 2nd, 1910.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

In this case submitted for adjudication, the court considering the pleadings, the evidence adduced and the law applicable thereto and for the written reasons delivered and filed this day.

It is ordered that there be judgment herein adjudging and decreeing the domicile of the deceased, T. Scott Burbank, to have been in the State of Louisiana, at the time of making the will hereinafter described and at the time of his death, and

It is accordingly ordered, adjudged and decreed that the will and testament of said T. Scott Burbank, executed in Temple, Te[illegible] on March 22nd, 1910, herein presented to the Court, on June 2[illegible], 1910, by Mrs. Anna Burbank and her husband, J. M. Woodson, is not such as can be registered, executed or given effect in the State of Louisiana and the demand of said Mrs. Anna Burbank and her husband, J. M. Woodson, is rejected at their cost.

It is further ordered, adjudged and decreed that the writ of

Habeas Corpus herein issued at the instance of Mrs. Josephine Ernst, legal tutrix, of the minor, Mary Springer Burbank, be dismissed as in case of non-suit, at her cost.

Judgment read and rendered in open court November 28th, 1910.

Judgment read and signed in open court Dec. 2nd, 1910.

(Sg.) E. K. SKINNER, *Judge.*

294 *Rule for New Trial.*

Filed December 2nd, 1905.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

On motion of James M. Woodson and of his wife, Anna M. Woodson, born Burbank, individually and as Executors of the last will of T. Scott Burbank, deceased, and as petitioners applying to register said will and to be recognized as such executors on complying with law, appearing herein by their counsel, Rice and Montgomery, and A. E. Billings.

It is ordered by the court that Mrs. Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank, and Nellie G. Dodge, wife of Wm. R. Dodge, show cause, on —, the — day of December, 1910, why a new trial should not be granted herein, for the reasons, besides others, following:

First. The judgment rendered herein is contrary to the law and the evidence.

Second. Said Judgment contravenes Article 4, Section 1, of the Constitution of the United States, by denying full faith and credit to the judicial proceedings had in the County Court of the State of Texas, in proof, probate of the last will and testament of said deceased, judgment of execution thereof, and in recognition, confirmation of the executors thereunder.

Third. Said judgment contravenes the Fourteenth Amendment to the Constitution of the United States by denying the right of deceased, a native born citizen of the United States, to establish a domicile in the State of Texas; and of Article 4, Section 2 of said Constitution, by denying to deceased, a citizen of the State of Texas, the privileges and immunities to which the citizens
295 of the State of Louisiana are entitled.

Fourth. The evidence establishes, without contradiction, that the legal domicile of said deceased was both before and at the time of making said last will and until his decease, at Temple, in the State of Texas.

Fifth. The Court having found as a fact, as fact it was, that the deceased had "unquestionably endeavored to make a change of domicile, that is, from the City of New Orleans, Louisiana, to Temple, in the State of Texas—thereby establishing the bona fide

intention of deceased to make such change, and the further fact that such intention was accompanied and followed by a bona fide residence in said City of Temple, all the requisites for such change of domicile existed and were performed by the deceased, before making said last will, and up to the time of his decease—the Court erred in adjudging his domicile not to have been at the making of said will and at his death in the City of Temple, aforesaid.

Sixth. The Court erred in holding that the deceased could not, while executor of his father's succession, lawfully change his domicile from the State of Louisiana, and establish such domicile in the State of Texas.

Seventh. The Court erred in holding that the deceased was estopped or legally disqualified from changing his domicile to the State of Texas, by the fact of having executed his power of attorney, before leaving the State of Louisiana, on say April 9th, 1909, in compliance with Article 1154 of the Civil Code, and by having continued thereafter in the exercise of the functions of Executor in the Succession of his father, E. W. Burbank.

Eighth. Because the right of said deceased to abandon his domicile in Louisiana, and to establish his domicile in Texas, was an absolute, unrestrictible right,—dependent solely on his free
296 will, and bona fide residence in place so chosen; and because the evidence establishes, beyond reasonable doubt, both such act of will and bona fide residence; and because no evidence in the record or legitimate inference therefrom supports the conclusion of the court and the judgment herein rendered.

Ninth. The court erred in setting aside and annulling the Will, in question, in toto, because of having determined that certain provisions thereof contravened the laws of Louisiana.

Tenth. The court erred in finding that, at any time, or in any proceedings, the Supreme Court of this State decided adversely to the contention of the deceased, in a case involving his interest in the Succession of his father, E. W. Burbank, the truth being that in the litigation referred to the Supreme Court maintained the contention of the deceased in every respect.

Refused.

N. O. Dec. 2nd, 1910.

E. K. S.

And Judgment Signed.

Rule for New Trial Refused. Extract from the Minutes of Friday December 2, 1910.

Present: Hon. E. K. Skinner, Judge.

It is ordered that said rule be discharged, and, accordingly the application for a new trial is refused at the costs of the movers; And the judgment herein rendered and read in open court on the 28th day of November, 1910 was signed in open court on this day.

Motion for a Suspensive Appeal.

Filed December 9th, 1910.

297 Civil District Court, Parish of Orleans.

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

On motion of James M. Woodson, and of Anna M. Burbank, his wife, by her said husband duly authorized, and by them made jointly herein, individually and as petitioners applying to be recognized as executors of the last will and testament of above named deceased, and defendants herein individually and as such executors in a cause filed by Mrs. Josephine Ernst praying to set aside and annul the said last will, appearing herein, through their counsel, Rice & Montgomery and A. E. Billings, and on suggesting to the Court that they are aggrieved at the final judgment rendered herein on the 28th day of November, 1910, and that they desire to appeal suspensively to the Supreme Court;

It is ordered by the court that movers be allowed a suspensive appeal from said judgment upon executing and filing bond in the sum of one hundred dollars ($100:00), which such security thereon and conditioned as the law requires; and that said appeal be made returnable to the Supreme Court on the 27th day of December, 1910.

Appeal Bond.

Filed December 9, 1910.

Know all men by these presents that we James M. Woodson, his wife, Anna M. Burbank, by him authorized, individually and as petitioners herein praying to be recognized as Executors of the last will and testament of T. Scott Burbank and individually and as such executors defendant in a proceeding to set aside and annul, said last will, filed by Josephine Ernst, legal tutrix of the
298 minor, Mary Springer Burbank and Chas. S. Rice, as surety are held and firmly bound unto the Clerk of the Civil District Court, for the Parish of Orleans, his successors, executors, administrators, and assigns, in the sum of One hundred dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents sealed with our seal, and dated in the City of New Orleans, on this 9th day of December in the year of our lord one thousand nine hundred and ten.

Whereas, the above bounden appellants have this day filed a motion of appeal from a final judgment rendered against them in the suit entitled the Succession of T. Scott Burbank, No. 93752 of the Civil District Court for the Parish of Orleans, on the 28th

day of November, 1910, and signed on the 2nd day of December, 1910.

Now the condition of the above obligation is such, That the above bound Appellants shall prosecute their appeal, and shall satisfy whatever judgment may be rendered against them or that the same shall be satisfied by the proceeds of their estate real or personal, if they be cast in the appeal; otherwise that the said surety shall be liable in their place.

(Sg.) CHAS. S. RICE. [SEAL.]

299 Certified Extracts From Record No. 88241 of the Civil District Court, Parish of Orleans, Entitled Succession of E. W. Burbank, and Filed in the Supreme Court on April 17th, 1911, in Cause Entitled Sucession of T. Scott Burbank, No. 93752 of the Civil District Court, and No. 18599 of the Docket of the Supreme Court.

Motion to Record Decree of the Supreme Court and Rule to Show Cause.

Filed April 28th, 1910.

Civil District Court for the Parish of Orleans.

No. 88241.

SUCCESSION OF EDWARD W. BURBANK.

On motion of A. E. Billings, and Rice & Montgomery, of counsel for T. Scott Burbank, Memie E. Burbank, wife of Dr. Joseph De Silva, and of said Dr. Joseph De Silva, to aid and authorize his said wife, and of Anna M. Burbank, wife of Dr. James M. Woodson, and of said Dr. James M. Woodson, to aid and authorize his said wife, and on exhibiting to the court and filing herein, the opinion and decree of the Supreme Court of Louisiana, upon appeal herein, which decree is final and in the words following, to-wit:

"It is therefore ordered, adjudged and decreed that the judgment appealed from be set aside and that this cause be remanded with instructions to the lower Court to proceed in accordance with the views expressed in the foregoing opinion"—as shown by the said opinion and decree;

It is therefore, ordered that said opinion and decree be filed and said decree entered upon the minutes and declared executory.

And it is further ordered that Nellie G. Burbank, wife of William R. Dodge, and said William R. Dodge, to aid and assist his said wife, show cause on Friday the 29th day of April, 1910, why, in accordance with the opinion and decree aforesaid, judgment should
300 not be entered herein dismissing the exceptions filed by her on April 23rd, 1909.

Answer of Mrs. William R. Dodge.

Filed May 10th, 1910.

Civil District Court, Division "E," Docket "1."

No. 88241.

SUCCESSION OF E. W. BURBANK.

Now comes Mrs. Nellie G. Burbank, wife of William R. Dodge, herein duly authorized, aided and assisted by her said husband, appearing herein in her individual capacity and as one of the Testamentary executors of this Succession and for answer to the petition of T. Scott Burbank, Mrs. Memie E. De Silva, and Mrs. Anna M. Woodson filed in these proceedings on April 12th, 1909, denies all and singular the allegations thereof except such as may hereinafter specially be admitted.

For further answer respondent admits that she and her above named brother and sisters were and are the only children of the late Edward W. Burbank, surviving at his death and are, therefore, the sole and only forced heirs, and Respondent also admits that she and her brother T. Scott Burbank, and her sister, Mrs. Memie E. De Silva, were and are the Testamentary Executors of the last will and testament of their said father.

For further answer Respondent denies that the statement annexed to the plaintiff's petition, marked Exhibit "Z" contains a list of all of the known debts of this Succession except those thereinafter stated in said petition, and Respondent denies that she ever consented or agreed to each and every one of the charges or debts referred to or named on the said Exhibit "Z."

301 For further answer respondent specially denies that the letters referred to in said petition are all of the letters that passed or were exchanged between Respondent's attorney and the attorneys for the plaintiffs, but, on the contrary, respondent alleges that plaintiffs omitted from the said correspondence the following mentioned letters, to-wit:

1st. A letter dated March 5th, 1909, addressed to the attorneys for plaintiffs and signed by Respondent's attorney, copy of which is hereto annexed and made part hereof, marked D. 1.

2nd. Another letter addressed and signed in the same manner, dated March 24th, 1909, marked D. 2.

3rd. Another letter addressed and signed in the same manner, dated April 8th, 1909, hereto annexed and made part hereof, marked D. 3.

And respondent alleges that there are other letters which passed and were exchanged between the said attorneys, but, which are not necessary to file at this time.

For further answer respondent denies that the interpretation of the agreement between herself and her co-executors is correctly stated

in plaintiff's petition, but, on the contrary, respondent alleges that the interpretation and construction of the said agreement as set forth in the said petition is incorrect, strained and unfounded, which said interpretation was alleged in the said petition for the sole and expressed purpose of casting odium and discredit upon Respondent and her attorney, and for the purpose of making it appear that respondent and her attorney had violated the agreement between herself and her co-executors, or had disregarded the same.

For further answer respondent specially denies that the plaintiffs complied with their portions of the said contract, but, on the contrary, respondent alleges that though she was at all times
302 ready and willing and anxious to comply with the terms, conditions and provisions of the said contract, the plaintiffs persistently refused to comply with the said terms and conditions; that they made unfounded demands upon respondent in violation of the said contract; that this is particularly true of the provisions in regard to a certain black breast pin referred to in the letters forming the said agreement, which, under the terms of the said agreement, was to be delivered to Mrs. Memie E. De Silva co-incident with the delivery of the special legacies referred to in the said correspondence; that pursuant to the said demand of the said Mrs. De Silva, the said black breast pin was delivered to her on March 15th., 1909, several days in advance of the delivery of the special legacies; that such advance delivery was made by respondent for the sole and expressed purpose of preserving the said agreement, and of preventing the plaintiffs, or one of them, from violating or attempting to violate or disregard the same.

For further answer respondent denies that plaintiffs made the delivery of the special legacies on March 22nd, 1909 as provided in the said agreement notwithstanding that Respondent was on the said day and on days previous thereto ready, willing and anxious to make the deliveries of the said legacies and to comply with the terms of the said agreement, and to have the plaintiffs do likewise; that owing to the refusal of the plaintiffs to comply with the said agreement at any time prior to March 22nd., 1909, the day on which the delivery of the legacies was to be made, respondent did on that day, make written demand upon the plaintiffs to make delivery of said legacies, and to otherwise comply with the terms of the said agreement on the said day, but, notwithstanding the said demand, the plaintiffs refused and declined to make delivery on the said day, but, on the contrary requested that the date of
303 the delivery be extended to at least the next or following day, to which request respondent agreed, such agreement on Respondent's part being for the purpose of having said agreement complied with in all of its terms and conditions, and to prevent the violation of the same, and also to prevent any misunderstanding, trouble or litigation between herself and the plaintiffs; that though respondent met the plaintiffs on March 23rd., 1909, for the purpose of making the delivery of the said legacies and of otherwise complying with the terms and conditions of the said agreement, and though the said legacies were delivered, the plaintiffs refused then and there

after to do any act looking to the carrying out of or complying with the terms and conditions of the said agreement.

For further answer respondent alleges that she at all times and in perfect good faith complied with the terms and conditions of the said agreement, and readily and willingly did everything in her power to have the said agreement carried out in good faith, but, that on the contrary plaintiffs arbitrarily obstructed and interferred with the carrying out of the terms and conditions of the said agreement.

For further answer, Respondent specially denies the she ever made as a condition precedent to the winding up and closing of this Succession, and to the carrying out of the said agreement, that this estate be fully administered upon as alleged in plaintiffs' petition, but Respondent admits and alleges that she did insist that the law and the said agreement be complied with, and that an account should be filed by the executors, and that all the debts and liabilities of the deceased, as well as the charges incurred by or against this estate or the executors thereof should be paid before delivering to the heirs the whole of this estate, but, that on the contrary, the plaintiffs insisted that the whole of the estate, including all of the cash
304 in the hands of the executors, should be delivered to the heirs without making any provision for the payment of the legacy of one hundred and 00/100 ($100.00) Dollars for the care of the grave of the deceased and his family, and without making provision for the payment of the debts and charges against this estate and of the legal charges incurred and due by the executors, all of which action on the part of the plaintiffs was contrary to the said agreement and to the law.

For further answer respondent denies that she or the plaintiffs or any of them, ever took possession of this estate, or that they could have taken possession of the same without complying with the law, and respondent specially denies that she ever agreed that she or the plaintiff should take possession or should be permitted to take possession of this estate without complying with the law and with their duty as executors in every respect.

For further answer Respondent alleges that it was never agreed, understood or contemplated by either plaintiffs or Respondent, nor does the contract evidenced by the letters referred to in plaintiffs' petition and in this answer, provide or contemplate that the heirs shall be recognized or placed in possession of this estate prior to or without the executors filing an account showing the conditions of this estate and the manner in which the executors have administered the same, but, that on the contrary, it was always understood and contemplated that such an account would be prepared and filed prior to the heirs being recognized or put in possession; that plaintiffs and this Respondent through their Respective attorneys held numerous conferences, having in view the preparation and filing of such an account, so much so, that the items to be placed thereon, and the amount thereof were the subject of many interviews, con-
305 versations and conferences, and several drafts of accounts were prepared and discussed by plaintiffs and Respondents

through their Respective attorneys; that the payments of certain debts and legacies by the Executors of this estate were made after conference and consultations between the said attorneys in anticipation of the filing of such an account, with the view of avoiding any unnecessary delay in the closing up of this estate, and for the purpose of placing the said items and the amounts which were agreed to be paid, on the said account, which was in course of preparation.

For further answer respondent alleges that she in perfect good faith concurred in the various payments of accounts in anticipation of filing an account by the Executors as herein above alleged, and it was not until the plaintiffs made their unjust, unwarranted and unlawful demands that one of the attorneys of the executors of this estate should consent or be compelled to accept a ridiculously low and inadequate fee for his services that plaintiffs in bad faith refused to join respondent in any account showing the condition of this estate and the manner in which the executors had administered the same, and presented their unjust and arbitrary demands as set out and alleged in their petition.

For further answer respondent denies that all of the legacies under the last will and testament and codicils of the deceased were paid, and that all of the debts of the deceased have been paid, or that all of the charges incurred by the executors have been paid.

Wherefore, Respondent prays that after due trial there be judgment in favor of Respondent and against the plaintiffs dismissing their suit at their cost and Respondent further prays for all equitable and general relief.

(Sg.) J. ZACH SPEARING, *Att.*

306 *Answer (Supplemental) and Demand in Reconvention.*

Filed July 6th., 1910.

Civil District Court, Division "E."

No. 88241.

SUCCESSION OF E. W. BURBANK.

Now comes Mrs. Nellie G. Burbank, wife of William R. Dodge, individually and as one of the Testamentary Executors of this estate and the said William R. Dodge for the purpose of aiding, authorizing and assisting his said wife, and for amended and supplemental answer to the petition of Mrs. Memie E. Burbank, wife of Dr. Joseph De Silva, of the State of Illinois, and of Mrs. Anna M. Burbank, wife of Dr. James M. Woodson of the State of Texas (T. Scott Burbank, the other petitioner having died since the filing of the said petition), reiterates all and singular the denials and allegations made by respondent in her original answer, the same as though the said denials and allegations were herein specifically set out. And now assuming the character of plaintiff in reconvention, Respondent alleges that

she is one of the Testamentary Executors and one of the heirs of the deceased; that Mrs. Memie E. De Silva, one of the plaintiffs is also one of the Testamentary Executors and one of the heirs of the deceased; that Mrs. Anna M. Woodson, another of the plaintiffs is one of the heirs of the deceased. that T. Scott Burbank, likewise one of the plaintiffs was up to the time of his death one of the Testamentary Executors and heir of the deceased, but, that the said T. Scott Burbank died on or about the 10th day of May, 1910, leaving Mary Springer Burbank, a minor about the age of thirteen years
307 as the sole and only child and heir.

For further supplemental answer and demand in reconvention, Respondent alleges that she is not willing in her capacity as Testamentary Executor to surrender possession of this estate to her co-heirs without filing a full and complete account of her administration and obtaining from her co-heirs, a full, final and complete release after a settlement made with them on the basis of a final account, duly approved and homologated according to law; that in her capacity, as one of the heirs of the deceased she is not willing to accept from Mrs. Memie E. De Silva her co-executor possession of this estate until after her co-executor shall have filed either alone or jointly, with Respondent, a full, final and complete account of her administration as such executor, showing the exact condition of this estate, nor until after such account shall have been approved and homologated.

For further supplemental answer and demand in reconvention respondent alleges that by common consent and for the convenience of all parties, the books, papers and documents including the cash book, check book, the bank book, the paid and cancelled checks and receipts for debts and legacies paid, were left in the possession of Alfred E. Billings, one of the attorneys for the executors herein; that under date of April 8th., 1909, T. Scott Burbank, at that time one of the executors herein, and Mrs. Memie E. De Silva, the other executor herein, appointed the said Billings as their Agent and Attorney in Fact, as appears by an act in notarial and authentic form passed before Frank Soule, Notary Public, for this Parish, and the said Billings thereafter continued in possession of the said books, papers and documents; that Respondent has recently made several demands upon the said Billings to be permitted to inspect and examine the said books, papers and documents and take therefrom such
308 memoranda or information as Respondent desired; the first demand having been made on or about the 19th day of May, 1910 and on subsequent days, up to and including the 30th day of May, 1910, as well as in open court on the first day of June, 1910, all of which said demands were peremptory, illegally, unlawfully and improperly refused and respondent has therefore been unable to inspect or examine the said Books, papers or documents, or to obtain any information in regard to the same the said Billings also refusing to even furnish Respondent with any information; that Respondent is therefore unable to ascertain the condition of this estate, or what debts, have or have not been paid; that such arbitrary, illegal and unlawful refusal on the part of the said Billings to permit Respondent

to examine the said books, papers and documents, or to give Respondent any information in regard to the same is an additional cause and reason why Respondent should not be required to deliver possession of this estate or any part thereof without being permitted to file an account and why Respondent is not willing to accept delivery of this estate or any part thereof to her without the said Mrs. Memie E. De Silva, her co-executor being required to file a full and complete account of her administration.

For further answer and demand in reconvention, Respondent alleges that while there may be no necessity for further administration of this estate, the estate is not in such a condition that it can be settled and finally wound up without the Executors filing a full, final and complete account; that all of the debts due by this estate have not been made; that the only manner in which it can be judicially determined whether or not all of the debts have been paid is by the filing of an account and the giving of the notices required by law; that unless such account is filed and notices given Respondent as one of the heirs of the deceased may be liable for her share or por-
309 portion of such debts as may be unpaid and not provided for; that respondent is particularly interested in seeing that all of the debts, costs and charges due by the deceased or by this estate are paid, or provided for not only because of the possible personal liability which may rest upon her for any unpaid debt, but, because of her duty as one of the Executors to see that the debts, charges and costs are paid and this estate properly administered, and also because she is a resident of this City, while two of the heirs, viz: Mrs. Memie E. De Silva and Mrs. Anna M. Woodson are non residents.

For further supplemental answer and demand in reconvention, respondent alleges that the Executors should be required to file a full, final and complete account; that thereafter and after due notices and advertisements as required by law, if it be ascertained that there or any debts, costs or charges due by the deceased or by this estate, or by the Executors and not paid, the said Executors shall be ordered and directed to retain in their hands a sum in cash sufficient to pay such unpaid accounts, debts or charges, and such costs as may be reasonably expected to be incurred in making a final settlement of this estate; that thereafter judgment be rendered recognizing the heirs of the deceased as such and ordering them put in possession of this estate, save and except such sum in cash as may be found necessary for the Executors to retain as above indicated and that the Executors be directed to deliver this estate to the heirs save and except the said sum in cash herein above referred to.

The premises considered Respondent and plaintiff in reconvention prays that she be permitted to file this supplemental and amended answer and demand in reconvention; that the petition and suit of the plaintiffs be dismissed and that the relief prayed for by them be denied; that there be judgment in favor of Respondent as
310 plaintiff in reconvention, ordering and directing the executors of this estate to file a full, final and complete account and if after such account be filed and it be found that there are debts,

costs or charges due by the deceased, or by this estate and not paid, or if there be any oppositions to the said account, there be judgment approving and homologating the said account so far as not opposed and ordering and directing the Executors to retain in their hands a sum in cash sufficient to pay and satisfy such unpaid claims, costs or charges and such incidental costs as may be reasonably expected to be incurred in making final settlement of this estate; that there be judgment recognizing the heirs of the deceased as such and ordering them put in possession of this estate, save and except such sum in cash as may be found necessary for the Executors to retain in their hands to pay and satisfy the unpaid debts, costs and charges and expenses above referred to, and that the executors be directed to deliver this estate to the heirs except the sum in cash above referred to as being necessary to be retained in the hands of the executors and Respondent and plaintiff in reconvention further prays for such other judgment orders as may be necessary and for all equitable and general relief and costs.

(Sg.) J. ZACH SPEARING, *Att'y.*

Order.

Let the foregoing amended and supplemental answer and demand in reconvention be filed as prayed for and according to law.

New Orleans, La. June 6th, 1910.

(Sg.) GEO. H. THEARD, *Judge.*

311 *Judgment.*

Rendered and Signed and Entered on Minutes of June 10, 1910.

Civil District Court, Division "E," Docket No. 1.

No. 88241.

SUCCESSION OF E. W. BURBANK.

Judgment.

This case came on for trial this day on the petition to be recognized as heirs and put in possession, filed April 12th, 1909 and the answer and supplemental answer thereto.

Present:

Alfred E. Billings and Charles S. Rice, attorneys for Mrs. Memie E. Burbank, wife of Dr. Joseph De Silva, individually and as one of the heirs of the deceased and in her capacity as one of the Testamentary Executors of this estate, and for Mrs. Anna M. Burbank, wife of Dr. James M. Woodson, one of the heirs of the deceased.

J. Zach Spearing, attorney for Mrs. Nellie G. Burbank, wife of William R. Dodge, individually and as one of the heirs of the de-

ceased, in her capacity as one of the Testamentary Executors of this estate, when by consent of all parties given and granted in open court.

It is ordered, adjudged and decreed that Mrs. Memie E. Burbank, wife of Dr. Joseph De Silva, Mrs. Anna M. Burbank, wife of Dr. James M. Woodson, and Mrs. Nellie G. Burbank, wife of William R. Dodge, be and they are hereby recognized as three of the sole and only children and forced heirs of the deceased, Edward W. Burbank (the other child and heir, T. Scott Burbank having died since the filing of the present proceeding, and his estate and
312 heir being unrepresented herein at this time) and as such they, the said Mrs. Memie E. De Silva, Mrs. Anna M. Woodson and Mrs. Nellie G. Dodge are hereby put in possession each of an undivided fourth part or share of all the property, movable and immovable, left by the said Edward W. Burbank, including his undivided half or share of the following described immovables, belonging to the community lately existing between him and his predeceased wife, Ann M. Springer, to-wit:—

1st. A certain portion of ground, together with the buildings and improvements thereon, situated in the 6th. District of this City, in square bounded by St. Charles Avenue, (formerly Nayades St.) Joseph, Rampart (formerly St. Denis) and Octavia Street forming part of square No. 57 of Rickerville, on a plan by B. Buisson and Thompson on the 23rd of March, 1849, and deposited in the office of J. R. Beard, Notary, measuring 140 feet, nine lines front on St. Charles Avenue, 454 feet, 4 inches and 2 lines deep and front on Joseph Street, 135 feet front on Rampart Street in the rear. All American measure.

2nd. Six certain lots of ground, together with the buildings and improvements thereon, and the rights, ways, privileges, advantages and servitudes thereunto belonging or in any wise appertaining, situate in the Second District of this City, in the square bounded by Levee (now Decatur) New Levee (now North Peters) Bienville and Conti Streets, designated by the Nos. Five, Six, Seven, Seventeen, Eighteen and Nineteen, on a plan by L. H. Pilie, Surveyor, which said lots have the following dimensions; lot No. Five has 21 feet, on and one half inch front on New Levee Street, by a depth of 55 feet, 6 inches on the side line of lots Nos. 4 and 20; 49 feet, 7 inches on the opposite side lines, and 20 feet, 4 inches and 4 lines in width in the rear; Lot No. Six has 21 feet, one and one third inches front on New Levee street, by a depth of 52 feet, 6
313 inches and 4 lines on the side of lots Nos. 5 and 19; 46 feet 7 inches and 4 lines on the opposite side and 20 feet, 4 inches and 4 lines in width in the rear. Lot No. 7 has 21 feet, one and one fifth inches front on New Levee street by a depth of 49 feet, 7 inches on the side line of lots Nos. 6 and 18; 43 feet 8 inches on the opposite side line and 20 feet, 4 inches and 4 lines width in the rear. Lot No. 17 has 20 feet, 4 inches and 4 lines front on Levee street by 43 feet, 8 inches deep, between parallel lines. Lot No. 18 has twenty feet, 4 inches and 4 lines front on Levee street by 46 feet, 7 inches and 4 lines in depth. Lot No. 19 has 20 feet,

4 inches and 4 lines front on New Levee street by a depth of 49 feet, 7 inches, between parallel lines.

3rd. (*a*) Two certain lots of ground, with the buildings and improvements thereon situated in the Sixth District in square No. 222 bounded by State, Coliseum, Perrier Streets and the upper line of Blumingdale; and designated by the Nos. 1 and 2 on a sketch by H. W. W. Reynolds, Deputy City Surveyor, March 11th, 1897, annexed to an act of sale from Parkside Improvement Company, Ltd., to Joseph Schutten, before Wenck, Notary, on April 5th, 1897, according to which said lots adjoin each other and measure, to-wit: Lot No. One forms the corner of Coliseum and State Streets, and measures 29 feet front on State Street, the same width in the rear, by a depth on the line separating it from Lot No. 2 of 143 feet, 8 inches, and a depth and front on Coliseum Street of 144 feet, 2 inches; and lot No. 2, measures 29 feet front on State Street, the same width in the rear, by a depth on side of lot No. One of 143 feet, 8 inches, and a depth of 143 feet, 2 inches on the opposite line.

One half lot of ground with the buildings and improvements thereon situate in the same square and measuring fourteen
314 feet, 6 inches front on State Street, the same width in the rear, by a depth on the line separating it from lot No. 2 of 143 feet, 2 inches and on the opposite side line of 142 feet, 11 inches.

1st. Also a certain sugar plantation in the Parish of Assumption, known as Avon Plantation, on the right Bank of Bayou Lafourche, about six miles below Donaldsonville, measuring six arpents front on said Bayou, by a depth of 80 arpents, bounded above by land of Valery Le Blanc and below by lands of Guillaume Mollere and on the rear by the northwest corner of Section 36, township 14, south range, 11 east, containing about 480 arpents.

2nd. The northwest quarter of section 36 in township 14, range 11 east, containing 160 acres, with the buildings and improvements thereon, mules, carts, wagons and farming utensils thereon.

3rd. A certain tract of land in the Parish of Assumption on the right Bank of Bayou Lafourche, about six miles from the Mississippi River, measuring one arpent front on said Bayou, and 40 arpents in depth, more or less, bounded above by the land of Auguste Landry and below by land of Messrs. Lenfrey, Savoie & Son with the buildings and improvements thereon.

4th. Another tract of land in said Parish, on the right Bank of Bayou Lafourche, about six miles from the Mississippi River, at about 50 arpents from Bayou Lafourche, measuring 5 arpents front, more or less, on a depth of 10 arpents, between converging lines, bounded in front by land of Auguste Landry, and above by land belonging to the deceased Edward W. Burbank, and below by land of Messrs. Lenfrey, Savoie & Son and in rear by lands of Auguste Landry and Messrs. Lenfrey, Savoie & Son, with all the improvements thereon.

5th. The Undivided half of another tract of land situated in said Parish immediately in the rear of the above secondly
315 described property, measuring 5 arpents front, more or less, at about sixty arpents from Bayou Lafourche on a depth of

10 arpents, more or less, between converging lines, bounded in front by the tract fourthly above described, and in the rear by lands belonging to Messrs. Lenfrey, Savoie & Son, with all the improvements thereon.

6th. A certain tract of land lying in said Parish on the right Bank of Bayou Lafourche at about six miles from the Mississippi River, measuring 5 arpents, more or less, back and adjacent to the front concession of lands formerly belonging to Lue Landry and Francoise Landry, his wife, on a depth of ten arpents, the lines closing, bounded on March 25, 1825, above by the land of Jean Trahan and below by land of Appollanaire Landry, and now by land belonging to this Succession and below by Messrs. Lenfrey, Savoie & Son, and in the rear by this Succession with all the improvements thereon.

Also 7th. A certain Sugar Plantation in said Parish on right descending Bank of Bayou Lafourche, at about five miles below Donaldsonville, measuring four arpents front on said Bayou by a depth of 80 arpents, bounded above by lands now or lately belonging to Dugas & Le Blanc Company, Ltd., and below by land of said Succession, with all the buildings and improvements thereon.

And it is further ordered, adjudged and decreed that the surviving executors herein do retain in their hands of the moneys belonging to said Succession, the sum of Twelve thousand dollars ($12,000.00) in order to provide for the payment and satisfaction of such unpaid, disputed or unliquidated claims, as may be presented and proved against the Succession, and the legacy of one hundred dollars ($100.) for care of the cemetery lot of the deceased and that the right, whatever the same may be be reserved to any party hereto to demand of the executors the filing of an account or to file an account of the administration of this
316 Succession.

Judgment by consent rendered, read and signed in open court, this 10th day of June, 1910.

(Sg.) GEO. H. THEARD, *Judge.*

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

I, L. W. Gunther, Deputy Clerk of the Civil District Court do hereby certify that the foregoing Sixteen (16) typewritten pages contain a true and correct copy of: The Motion to Record Decree of Supreme Court, filed April 28th, 1910, Answer of Mrs. Dodge filed May 10th, 1910, Supplemental Answer and Demand in Reconvention, filed June 6th, 1910 and judgment read, rendered and signed June 10th, 1910, all filed in the matter entitled Succession of E. W. Burbank, No. 88241 of the Docket of this Honorable Court, and are to be found, the originals thereof, amongst the Archives of this office.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of this Court, this 14th day of March, in the year of our Lord, one thousand nine hundred and eleven, and the 135th year of the Independence of the United States of America.

(Signed) L. W. GUNTHER,
[SEAL.] *Deputy Clerk.*

317 *Copy of Transcript of Appeal No. 93752 of the Civil District Court, Entitled Succession of T. Scott Burbank, and Filed in the Supreme Court, State of Louisiana, on October 6th, 1911, under the No. 19122; and upon Motion made in Supreme Court on October 7th, 1911, Ordered to be Consolidated with Appeal No. 18599 of the Docket of the Supreme Court, State of Louisiana, Entitled Succession of T. Scott Burbank.*

Supreme Court for the State of Louisiana.

No. 19122.

Filed October 6th, 1911:
(Signed) PAUL E. MORTIMER, *Clerk.*

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Civil District Court for the Parish of Orleans.

No. 93752.

Civil District Court, Division "C."

SUCCESSION OF T. SCOTT BURBANK.

Appeal of Josephine Ernst, Tutrix of the Minor, Mary Springer Burbank, from Judgment Rendered on the 28th day of November, 1910, and Signed on the 2nd day of December, 1910.

Messrs. Dart, Kernan & Dart, Attorneys for Josephine Ernst, widow, etc., Appellant.
Messrs. Rice & Montgomery, Attorneys for Defendants and Appellee.

318 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Civil District Court for the Parish of Orleans.

No. 93752.

Petition for Family Meeting and Order.

Filed March 2nd, 1911.

Civil District Court, Division "C."

SUCCESSION OF T. SCOTT BURBANK.

To the Honorable Judges of the Civil District Court in and for the Parish of Orleans:

The petition of Mrs. Josephine Ernst, Natural Tutrix of the minor Mary Springer, respectfully shows:

That a suit has been instituted in this Honorable Court, under the No. 94976, by Mrs. Nellie G. Dodge against Mrs. Memie E. Burbank, wife of De Silva et al., including the minor Mary Springer Burbank, and for a partition and division of all the property held in common between the plaintiff and the defendants in said suit;

Petitioner shows that she knows of no defence to said action, but, on the contrary, believes that it is to the interest of the minor that said partition be granted; that petitioner desires to submit the matter of said suit to a family meeting and to obtain their opinion and recommendation regarding the same and regarding the compromise and conditions under which the property should be sold;

Petitioner suggest- to compose said family meeting the
319 following persons:

Dr. Oliver Ernst, Maternal Uncle;
Charles R. Ernst, Maternal Granduncle;
J. A. Burbank, paternal second cousin;
Thomas S. Burbank, paternal second cousin;
Edward Ernst, granduncle;
Andrew L. Ernst, uncle;
Louis J. Dauin, friend of the minor; and,
John J. Lawrence, friend of the minor;

Wherefore, petitioner prays that an order may issue directing William Mc. L. Faysseux, Notary Public, to convene in family meeting the persons hereinabove named for the purpose of considering and advising upon the subject matter of this petition and upon the matter of the partition suit referred to herein, and, in case they should advise that the said partition should be effected, that —also recommend concerning the terms and conditions, so far as the minor's interest- are concerned, and all such matter and things as may come before them or lie within their purview; and, petitioner prays for such other and further orders as the case requires, and for all general and equitable relief.

(Signed) DART, KERNAN & DART, *Att'ys.*

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Order.

Let an order issue to William Mc. L. Faysseux, Notary Public, to convene in family meeting the persons named in the peti-
320 tion, for the purpose of considering and advising upon the subject matter therein set out and upon the matter of the partition therein referred to, the whole as herein prayed and according to law.

New Orleans, March 2nd, 1911.

(Signed) E. K. SKINNER, *Judge.*

Petition for an Appeal and Order.

Filed October 6th, 1911.

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

To the Honorable the Judges of the Civil District Court in and for the Parish of Orleans:

The petition of Josephine Ernst, Widow of Felix Ernst, the legal Tutrix of the minor Mary Springer Burbank, and a resident of this City of New Orleans, respectfully shows;

That petitioner is advised and believes there is error to the prejudice of petition and of the said minor in the judgment entered herein on the 28th day of November, 1910, and signed on the 2nd day of December 1910, and she desires on behalf of said minor to prosecute a devolutive appeal from said judgment.

Wherefore, petitioner prays that a devolutive appeal may be granted to petitioner as Tutrix of the minor Mary Springer Burbank, from the judgment entered herein on the 28th day of November, 1910, and signed on the 2nd day of December, 1910, for and in behalf of said minor, returnable to the Honorable the Supreme Court of the State of Louisiana at such time as may
321 be set and upon such bond as may be fixed by the Court, and petitioner prays for Citation to Anna Burbank, wife of James M. Woodson, and James M. Woodson, her husband, individually and as Executors of the so-called last will of T. Scott Burbank, deceased; to Mamie Burbank, wife of Joseph De Silva, and Joseph De Silva, her husband, and, to Nellie G. Burbank, wife of William R. Dodge, and William R. Dodge, her husband, and petitioner prays for such other orders as the case requires, and all general and equitable relief.

(Signed) DART, KERNAN & DART, *Att'ys.*

Civil District Court, Division "C."

No. 93752.

SUCCESSION OF T. SCOTT BURBANK.

Order.

Let a devolutive appeal be granted to the petitioner herein from judgment entered on the 28th, day of November, 1910, and signed on the 2nd, day of December, 1910, said appeal to be returnable to the Honorable Supreme Court of the State of Louisiana on the

23rd, day of October, 1911, and upon petitioner furnishing bond, in the sum of One hundred Dollars ($100.00) with good and solvent surety, and conditioned according to law, and let citation issue to all parties appellee herein, as provided by law.

New Orleans, October 6th, 1911.

(Signed) E. K. SKINNER, *Judge.*

Appeal Bond.

Filed October 6th, 1911.

[illegible] men by these presents That we Josephine Ernst, widow of Felix Ernst, legal Tutrix of the minor Mary Springer
322 Burbank as principal and Henry P. Dart as surety are held and firmly bound unto Thomas Connell, Clerk of the Civil District Court, for the Parish of Orleans, his successors, executors, administrators and assigns, in the sum of One Hundred Dollars for the payment whereof we bind ourselves, our heirs, executors and administrators firmly by these presents sealed with our seal, and dated in the City of New Orleans, on this Sixth day of October in the year of our Lord one thousand nine hundred and Eleven.

Whereas, the above bounden Josephine Ernst, Legal Tutrix of the minor Mary Springer Burbank, have this day filed a petition of appeal from a final judgment rendered against her in the suit of Succession of T. Scott Burbank, on all the matters in litigation therein. No. 93752 of the Civil District Court, for the Parish of Orleans, on the Twenty Eighth day of November, 1910, and signed on the Second of December, 1910.

Now the condition of the above obligation is such, That the above bound Josephine Ernst, Legal Tutrix of the minor Mary S. Burbank, as principal shall prosecute said appeal, and shall satisfy whatever judgment may be rendered against her that the same shall be satisfied by the proceeds of her estate real or personal if she be cast in the appeal; otherwise that the said Henry P. Dart, surety, shall be liable in her place.

Signed, sealed and delivered in the presence of

(Signed) JOSEPHINE ERNST,
Legal Tutrix, of the Minor Mary Springer Burbank.
By DART, KERNAN & DART. [SEAL.]
HENRY P. DART. [SEAL.]

323 *Certificate.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, Joseph Doyle, Deputy Clerk of the Civil District Court for the Parish of Orleans, do hereby certify that the foregoing 5 (Five) pages and Transcript heretofore forwarded to Supreme Court, bear-

ing No. 18599, do contain a true, correct and complete Transcript of all the proceedings had, documents filed and evidence adduced upon the trial of the cause wherein Succession of T. Scott Burbank, instituted in this Court and now in the records thereof under the No. 93752 of Div. C., the Hon. E. K. Skinner, Presiding.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said Court at the City of New Orleans, on this 6th day of Oct. in the year of our Lord, one thousand nine hundred and 11, and in the one hundred and 36 year of the Independence of the United States of America.

(Signed) JOS. DOYLE,
[SEAL.] *Deputy Clerk.*

324 *Motion to Consolidate with Appeal No.* 18599.

In the Supreme Court of the State of Louisiana.

No. —.

SUCCESSION OF T. SCOTT BURBANK.

On motion of Josephine Ernst, Legal Tutrix of the minor Mary Springer Burbank, appellant herein, on suggesting to the Court that the appeal herein prosecuted and filed is a devolutive appeal taken by mover from the judgment rendered in the lower court on November 28, 1910, and signed on the 2nd day of December, 1910.

On further suggesting that there is pending in this Court a suspensive appeal taken by James M. Woodson and Mrs. Anna Burbank Woodson, individually and as Executors of the late T. Scott Burbank, which appeal was taken from the same judgment; that the issues involved in the appeal are the same issues which will be presented under mover's appeal, all of which will more fully appear from said Transcript No. — of the docket of this Court and from the briefs of the parties appellant and appellee on file herein; and on suggesting that the interests of justice require that the two appeals should be consolidated and heard at the same time, so that one judgment may be rendered, disposing of the entire controversy;

It is ordered by the Court that the appeal hereinabove taken, to-wit, the devolutive appeal taken by Josephine Ernst, Legal Tutrix of the minor Mary Springer Burbank, from the judgment rendered in the lower court on November 28, 1910, and signed on December 2, 1910, which appeal was lodged in this Court on October 6, 1911, be, and the same is hereby, consolidated with the case entitled "Succession of T. Scott Burbank," No. 18599 of the docket of this Court, and that the two appeals be consolidated and heard at the same time and disposed of by the same opinion and decree.

325 I see no objections to the granting of the above.

(Signed) J. ZACH SPEARING,
Att'y for Mrs. W. R. Dodge.

(Endorsed on back:) No. 19,122—Supreme Court of Louisiana—Succession of T. Scott Burbank—Motion to consolidate with 18,599—Entered and filed without prejudice, Oct. 7th, 1911. (Signed) Paul E. Mortimer, Clerk.

326 Proceedings Had in the Supreme Court of the State of Louisiana.

No. 18599 of Supreme Court.

No. 93752 of Civil Dist. Court.

Transcript of Appeal Filed in Supreme Court.

SUCCESSION OF T. SCOTT BURBANK.

Filed December 27th, 1910.
(Signed) PAUL E. MORTIMER, *Clerk.*

Final Judgment.

Extract From Minutes.

NEW ORLEANS, *Monday, October 16th,* 1911.

The Court was duly opened pursuant to adjournment. Present their Honors: Joseph A. Breaux, Chief Justice. And Frank A. Monroe, Olivier O. Provosty, and Alfred D. Land, Associate Justices. Absent: Walter B. Sommerville, Associate Justice.

His Honor, Mr. Justice Land pronounced the judgment and opinion in the following case:

No. 18599.

SUCCESSION OF T. SCOTT BURBANK.

It is therefore ordered that the judgment of the lower court be amended by dismissing the proponent's application, as of non-suit, with costs in both courts.

327 *Opinion and Decree of the Court.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

NEW ORLEANS, *Monday, October 16th,* 1911.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors, Joseph A. Breaux, Chief Justice; Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Justices.

Absent: Walter B. Sommerville.

His Honor, Mr. Justice Land, Pronounced the opinion and judgment of the Court in the following Case:

327½ SUCCESSION OF T. SCOTT BURBANK.

Nos. 18599 & 19122.

Appeal from the Civil District Court, Parish of Orleans. Skinner, Judge.

T. Scott Burbank died in Temple, Texas, on May 10, 1910, leaving a last will and testament of date March 22, 1910, which was duly probated in the County Court of Bell County, Texas, on June 14, 1910. Burbank was a widower, and left a minor daughter, Mary S. Burbank, as his sole heir at law. The executors named in the will on June 22, 1910, presented to the Civil District Court for the Parish of Orleans, a duly exemplified copy of said will and of the probate thereof, and prayed that the same be duly registered, and that they be recognized as executors on qualifying according to law.

T. Scott Burbank had been for many years a resident of the State of Louisiana. On June 6, 1910, Mrs. Nellie C. Dodge, a sister of the deceased, instituted proceedings in the Civil District Court for the Parish of Orleans, for the appointment of a tutor and under-tutor to her minor niece, Mary S. Burbank. In her petition, Mrs. Dodge alleged that her deceased brother was domiciled in New Orleans at the time of his death. On June 10, 1910, Mrs. Josephine Ernst, the maternal grand-mother of the minor, intervened, praying to be confirmed and appointed tutrix. On June 17, 1910, judgment was rendered appointing Mrs. Ernst, tutrix as prayed for, and she having duly qualified, letters were issued to her as tutrix on June 21, 1910. The inventory taken in the proceedings showed that the estate of the late T. Scott Burbank in Louisiana consisted of his undivided one-fourth interest in the estates of his deceased father and
328 mother, the late E. W. Burbank and wife, estimated at $400,902.52.

It, therefore, appears that when the alleged Texas will was presented for registration and execution on June 22, 1910, the estate of the decedent in Louisiana was in *custodia legis*, under the administration of Mrs. Josephine Ernst, as tutrix of her grand-daughter, sole heir of her deceased father. The executors of the alleged Texas will by their counsel on June 14, 1910, filed with the notary in said tutorship proceedings, a written protest against the appointment of any tutor to the minor, on the grounds that T. Scott Burbank was a citizen and resident of the State of Texas, which fact fixed the domicile of the minor in Texas, and, therefore, the courts of Louisiana, were without authority to appoint a tutor for her. The same counsel appeared before the court as amicus curiae and urged the same objections.

Upon the application to file the Texas will, Mrs. Ernst, as tutrix, objected, on the following grounds:

1. That T. Scott Burbank was not a resident or citizen of the State of Texas, nor had he ever been domiciled therein.

2. That the deceased was mentally incompetent to make said will.

3. That the will is void for defect of form and not such as to

convey the defendant's estate, especially the real property of large value in the State of Louisiana. After hearing said objections, the court ordered the will to be filed, subject to further hearing.

On June 27, 1910, Mrs. Ernst, tutrix, filed in the succession record a direct action to annul the Texas will on grounds substintially as follows:

1. That the deceased was mentally incompetent from ill-
329 ness and disease of the brain, to make a testament, and shortly after the date of the alleged will committed suicide.

2. That the deceased was a citizen and resident of the State of Louisiana, and never had any other residence or domicile.

3. That the estate of the deceased is situated in the City of New Orleans, State of Louisiana.

4. That the alleged will is null, void and inoperative inasmuch as it creates a prohibited substitution and a fidei commissum.

5. That the alleged will works a great injustice and injury to the minor, who under the law of Louisiana is the sole heir of the deceased, and is entitled to take the estate free of the conditions attempted to be imposed by said alleged will.

The executors and the three sisters of the deceased named in the will were cited and appeared. The executors and the two sisters, Mrs. Woodson and Mrs. De Silva averred that the document presented was the last will and testament of the deceased, valid in form and duly probated in the State of Texas, at the place of the last residence and domicile; that the executors named therein had been duly qualified; that the allegations as to the incompetency of the testator, and as to his residence in the State of Louisiana, were not true; that the testator was legally domiciled in Temple, State of Texas, and was a citizen of that State, and was not domiciled elsewhere; that the testator possessed large properties in the States of Texas and Louisiana, and that his property in the latter State consisted of his undivided share or interest in the successions of his father and mother. The respondents denied that the Texas will was null and void for or on account of any of the matters alleged in the petition, and all other matters and things not specially admitted in their answer.

Mrs. Dodge, the third sister, after pleading the general issue, ad-
mitted that her father, T. Scott Burbank, was a citizen of
330 Louisiana and a resident of New Orleans, where he had his legal domicile, and averred her belief that the Texas will was not made by her father understandingly and that it should be annulled and set aside in the best interest of the minor.

None of the respondents excepted to the capacity of Mrs. Ernst, as tutrix to maintain the action.

When the judgment appointing Mrs. Ernst as tutrix is assailed by direct action, it will be time enough to consider its validity.

The last will and testament of the deceased is valid as to form, under the laws of Texas. By its terms the whole estate was left under the administration and control of the executors, who were directed from time to time, to pay over to the guardian of the person of the minor daughter of the deceased such sums as might be needed for her support and education; and when said daughter

arrives at the age of twenty-one years, the executors are directed to deliver to her the sum of $20,000; one half of the remainder of the estate to be delivered to the said daughter when she arrives at the age of twenty-five, and the remainder when she arrives at the age of thirty years. In the case of the death of the daughter without issue, the testator directed that such of the estate as then remains shall go to and become the property of his three sisters in the amounts, to-wit: $100 to Mrs. Dodge, ½ of the remainder to Mrs. De Silva, and the other ½ to Mrs. Woodson, who was named guardian of the person of the minor. It is evident that, under the will, the executors were to act as sole guardians of all the property left to the minor daughter, and as her trustees after she became of age. Under such a will no guardian of the minor's estate could be appointed.

It is conceded by counsel on both sides that the validity of the probate of the will in Texas, hinges on the question of the
331 domicile of the testator at the date of the confection of the testament. Succession of Drysdale, 124 La. 266.

T. Scott Burbank was a citizen and resident of the State of Louisiana for many years. In May 1896, Burbank married Miss Ida Ernst in New Orleans. The minor, Mary S. Burbank was the sole issue of this marriage. The wife and mother died in December, 1899. In December, 1908, E. W. Burbank died in New Orleans, leaving a last will, in which T. Scott Burbank, a son of the deceased, was named as one of the executors. The will was duly probated and T. Scott Burbank was duly qualified as one of the three executors without bond. In these proceedings T. Scott Burbank represented himself in one petition, as residing in the Parish of Orleans, and in another as residing in the City of New Orleans. The estate was appraised at an amount exceeding $400,000. In a notarial act of sale, dated March 18, 1909, of certain succession lands, T. Scott Burbank and his sister Mrs. Dodge were described as "residents of the Parish of Orleans." In a petition filed April 12, 1909, to be recognized and put in possession as one of the forced heirs of his father, T. Scott Burbank described himself as "of the City of New Orleans." This application was resisted successfully in the lower court by Mrs. Dodge, one of the executors and forced heirs, and T. Scott Burbank et al. appealed to the Supreme Court. The judgment below was reversed and the case remanded in April, 1910. See Succession of Burbank, 126 La. 9. On April 24, 1910, T. Scott Burbank by counsel appeared in the Civil District Court of the Parish of Orleans, and moved that the mandate of the Supreme Court be filed, recorded and declared executory.

On April 8, 1909, Thomas Scott Burbank, a resident of the City of New Orleans, and Mrs. De Silva, a resident of Illinois, in their capacity as testamentay executors in the succession of Edward
332 W. Burbank, appeared before a Notary and declared, "That being about to absent themselves temporarily from the State of Louisiana, and in order to comply with the law in such cases made and provided and especially with Article 1154 of the Revised Civil Code of said State," they and each of them constituted and

appointed Alfred E. Billings of the City of New Orleans, their true and lawful attorney in fact, to represent them generally and specially as executors in the administration of said succession. Art. 1154 of the Civil Code authorizes such a procuration where an executor "only wishes to be absent for a time." Under C. C. Art. 1153, such absence cannot exceed one year.

Soon after the execution of said procuration, T. Scott Burbank left New Orleans and went to the home of his sister, Mrs. De Silva, in Illinois. There he remained, with his child, until February 20, 1910, when they left for Temple, Texas, the home of his other sister, Mrs. Woodson, with whom he resided until his death by suicide on May 10, 1910. On March 22, 1910, Burbank made the will in controversy, which contains the following sentence, to-wit: "I hereby declare and state that my residence is in the County of Bell and State of Texas, which is my permanent home, and that I am a citizen of the State of Texas." That Burbank actually resided in Temple, Texas, is conceded. That he really intended to make that place his home or domicile is denied. Burbank had been for several years in bad health. A part of his skull had been removed to relieve paralysis resulting from an abcess on the brain caused by a severe attack of catarrh. After spending some time at the home of his sister, Mrs. De Silva, in Illinois, Burbank resolved to seek a milder climate, and in February, 1910, left for Temple, Texas to visit his sister, Mrs. Woodson. On March 4, 1910, he wrote to Mrs. De Silva, from Temple, Texas, as follows: "I intend to make
333 this my home, so you can send me my bank-box and money that I have there, also the photographs that are in my room. Send the box by express and the key by registered mail. I like it very well down here and feel better since I came."

Burbank declared to the attorney who drafted his will, and other witnesses, that Temple was his permanent home. The Texas Court after hearing testimony decreed that the permanent domicile of the deceased was in County of Bell, State of Texas, and that he left an estate situated and located in said County and State, and subject to the jurisdiction of the Court. The deceased owned no realty in Texas, but left there the personal property he carried with him when he departed from the State of Louisiana in April, 1909. The remainder of the estate consists of an undivided fourth interest in the succession of his father and mother in the State of Louisiana, which is an incorporeal immovable. Weber vs. Ory, 15 La. An., 541.

On the other hand, the recitals of the notarial act of procuration is conclusive evidence against Burbank that he left the State of Louisiana in April, 1909, with the intention of returning. This procuration was never revoked and remained on the records as a continuing declaration that Burbank was temporarily absent from the State. Up to the date of Burbank's death, his agent continued to represent him as an executor temporarily absent from the jurisdiction of the court. On Burbank's judicial admissions and on his declaration of intention as expressed in the act of procuration, he could have been sued in personam in the courts of the Parish of Orleans at any time before his death. Burbank could not have lawfully left the State permanently without first surrendering his trust, rendering an ac-

ent of his administration, paying the balance due, if any. C. C. 1153.

334 The declaration of temporary absence in the procuration was equivalent to one that Burbank did not intend to abandon his domicile in the City of New Orleans.

The highest proof in this State of an intention to change domicile is by a declaration in writing, signed by the party making it, and registered by the recorder. C. C. 42. "In case this declaration is not made the proof of this intention shall depend upon circumstances." C. C. 43. In the case at bar we have the solemn declaration of Burbank, duly recorded, that he had no intention of changing his domicile, opposed by his private declarations and writings made in another State. In Louisiana, Burbank posed as an executor temporarily absent from the State of his domicile, while in Temple he represented himself to be a citizen and permanent resident of the State of Texas. Burbank on the eve of leaving New Orleans in April, 1909, executed his last will by notarial act. About March 12, 1910, he consulted a lawyer in Temple, Texas, stating that he desired to make a will that would be valid under the laws of Texas. As nearly his whole estate was situated in the State of Louisiana, and as he had already made a will in that State, his evident intent was to dispose of his property in a manner not warranted by the laws of the situs. The will made ten days later shows that the intent was to create a trust and a substitution repugnant to laws of the State of Louisiana. Succession of Beauregard, 49 La. An., 1176; McCan case, 48 La. An., 145. Burbank's declarations of his Texas citizenship, unnecessarily repeated in the will itself, are calculated to create the suspicion that he was making up a fictitious case of domicile. However, that may be, such private declarations as to intent are more than counter balanced by his public declarations of record and his official acts as resident executor in the State of Louisiana.

It is therefore ordered that the judgment of the lower court
335 be amended by dismissing the proponent's application, as of non-suit, with costs in both courts.

Rehearing refused November 13th., 1911.

Syllabus.

Under C. C. 1154, a resident executor cannot lawfully absent himself, even for a limited time, from this State, without first executing and recording a procuration appointing a resident agent to represent him in all the acts of his administration. Where such a procuration expressly declares that the executor intends to depart temporarily from the State, such intent is conclusively presumed to continue until the procuration is revoked or recalled. During the life of the procuration the executor is considered as present in the State, through his accredited representative, and is concluded in the Courts of Louisiana from asserting a change of domicile to another jurisdiction; and the executors of a will made by him, out of the State are in no better position. Such a will must be probated in the State of Louisiana as in case of wills of residents of this State.

336 *Petition for Rehearing.*

Supreme Court of Louisiana.

Nos. 18599 & 19122.

SUCCESSION OF T. SCOTT BURBANK.

The petition of James M. Woodson, of Temple, Texas, and of his wife, Anna M. Burbank, appellants, in their capacity as Testamentary Executors, praying for the registry of the last Will and Testament of said T. Scott Burbank, deceased, and order for its execution by virtue of certain proceedings in probate thereof, had in the County Court of Bell County, State of Texas, and order for its execution, respectfully shows:

That there is error to their prejudice in the opinion and decree founded thereon of this Honorable Court and that a rehearing should be granted, on the grounds following:

First. The said opinion and decree are contrary to the law and the face of the record.

Second. That the said decree contravenes Article 4, Section One, of the Constitution of the United States, by denying full faith and credit to the judicial proceedings and judgment of the County Court of Bell County, State of Texas, a Court of competent jurisdiction, in proof and probate of the last Will and Testament of said deceased, decreeing execution thereof and in recognition and confirmation of petitioners as Executors thereunder.

Third. That said decree contravenes the Fourteenth Amendment to the Constitution of the United States, by denying the right of the deceased, a native born citizen of the United States, to establish a domicile in the State of Texas; and of Article Four, Section 2
337 of said Constitution, by denying to deceased, late a citizen of the State of Texas, the privileges and immunities to which citizens, whether of Texas or of Louisiana are equally entitled.

Fourth. Because the Court disregards as of no probative force the uncontradicted oral and written evidence in the record establishing that the bona fide and legal domicile of the deceased was before and at the time of confecting his said last Will, and until and at his death, in Temple, in the State of Texas.

Fifth. Because of error in holding that any act performed in his lifetime by the testator, and especially by his executing his power of Attorney, in compliance with Article 1154 of the Civil Code of Louisiana, did, in law, deny to testator, a person and citizen sui juris, the right to change his domicile, pending either the lifetime of such power of attorney, or the settlement of the Succession and the discharge of himself as one of the Executors.

Sixth. Because of error in denying the right of said testator to change his domicile, from whatsoever motive, at will,—the intention to change such domicile, and the fact of residence non animo revertendi, being facts depending solely on the person so intending and residing, and whom nobody may let or hinder.

Seventh. Because fraud is never presumed; it must be alleged and proved (which it was not); and the burden of proof is upon the party alleging it.

Eighth. Because it was error in the Court to condemn proponents, appellants, in the costs in these proceedings,—they having appeared in the matters acted on by the Court in their capacity of Executors, as they were in law bound to do, and solely for the purpose of carrying out the intentions and provisions of testator's will, in said capacity.

Wherefore, they pray that a re-hearing herein be granted,
338 and that they have all general relief.

(Signed)) RICE & MONTGOMERY,
(Signed)) ALFRED E. BILLINGS,
Of Counsel for Proponents & Appellants.

(Endorsed:) Nos. 18,599 & 19,122. Supreme Court of Louisiana. Succession of T. Scott Burbank. Petition for Rehearing with printed Argument Attached. Filed Oct. 30, 1911. (Signed) Paul E. Mortimer, Clerk.

Petition for Rehearing.

In the Supreme Court of the State of Louisiana.

Nos. 18599 and 19122.

SUCCESSION OF T. SCOTT BURBANK.

To the Honorable the Supreme Court of the State of Louisiana:

The petition of Josephine Ernst, Legal Tutrix of the minor Mary Springer Burbank, respectfully shows:

She is advised there is error to the prejudice of said minor in the form of the final decree herein rendered and petitioner desires that said decree should be amended so as to grant final relief in the premises instead of a non-suit.

That a decree of non-suit leaves open the several issues raised controverted, discussed and decided in this case and it is to the interest of the minor that all matters so finally concluded should be perpetually set at rest.

That petitioner is advised that the decree as framed will not support the plea of res adjudicata upon any of the issues litigated and decided in this case.

339 That petitioner files in support of this application a brief upon the subject matter.

Wherefore, petitioner prays that the decree handed down herein may be amended by changing the same into a final judgment or into a judgment so framed as to be final upon the various elementary issues set up and decided herein, and petitioner prays for such other and further relief as the matter requires.

(Signed) DART, KERNAN & DART,
Attorneys.

(Endorsed:) Nos. 18,599 and 19,122. Supreme Court. Succession of T. Scott Burbank. Petition for Rehearing. Filed Oct. 30, 1911. (Signed) Paul E. Mortimer, Clerk.

Rehearing Refused.

(Extract from Minutes.)

NEW ORLEANS, *Monday, November 13th,* 1911.

The Court was duly opened pursuant to adjournment.

Present, their Honors: Joseph A. Breaux, Chief Justice. And Frank A. Monroe, Oliver O. Provosty, and Alfred D. Land, Associate Justices.

Absent: Walter B. Sommerville, Associate Justice.

By the COURT.

Nos. 18599 and 19122.

SUCCESSION OF T. SCOTT BURBANK.

It is ordered that the rehearing applied for in these cases be refused.

340 *Petition for Writ of Error.*

Supreme Court of Louisiana.

Nos. 18599 and 19122.

SUCCESSION OF T. SCOTT BURBANK.

ANNA M. BURBANK, Wife of James M. Woodson, and JAMES M. WOODSON, Executors of the Last Will of T. Scott Burbank, and Individually, Plaintiffs in Error,

versus

JOSEPHINE ERNEST, Legal Tutrix of the Minor, MARY S. BURBANK, Defendant in Error.

To the Honorable Joseph A. Breaux, Chief Justice, and the Associate Justices of the Supreme Court of Louisiana:

The petition of Anna M. Burbank, wife of James M. Woodson, and of said James M. Woodson, Testamentary Executors of the last Will of T. Scott Burbank, and individually, with respect shows:

That they are aggrieved by the final judgment made and entered in this cause on the 16th. day of October, A. D. 1911, and wherein re-hearing was refused on the 13th. day of November, A. D. 1911, in favor of the defendant and opponent, Mrs. Josephine Ernst,

Legal Tutrix of the minor, Mary Springer Burbank, and against these petitioners, plaintiffs, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice of these petitioners, plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, they pray that a Writ of Error may issue in this behalf out of the Supreme Court of the United States, for the correction of the errors so complained of, to operate as a supersedeas,
and that a transcript of the record, proceedings and papers
341 in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

(Signed) A. E. BILLINGS,
(Signed) RICE & MONTGOMERY,
Of Counsel for Petitioners.

Order Granting Writ of Error.

Supreme Court of Louisiana.

Nos. 18599 and 19122.

SUCCESSION OF T. SCOTT BURBANK.

ANNA M. BURBANK, Wife of James M. Woodson, and JAMES M. WOODSON, Executors of the Last Will of T. Scott Burbank, and Individually, Plaintiffs in Error,

versus

JOSEPHINE ERNEST, Legal Tutrix of the Minor, MARY S. BURBANK, Defendant in Error.

This 4th day of December, A. D. 1911, came the above named plaintiffs, by their Attorneys, and filed herein and presented to the Court their petition, praying for the allowance of a writ of error, and assignment of errors intended to be urged by them, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as may be proper in the premises:

On consideration whereof, the Court does allow the writ of error upon the plaintiffs' giving bond, according to law, in the sum of One thousand dollars ($1000), which shall not operate as a supersedeas bond.

[SEAL.] (Signed) JOS. A. BREAUX,
Chief Justice.

342 (Endorsed:) Nos. 18599 & 19122. Supreme Court of Louisiana. Succession of T. Scott Burbank. Anna M. Burbank, wife of James M. Woodson, and James M. Woodson, Executors of the last will of T. Scott Burbank, and individually, Plaintiffs in Error. Mrs. Josephine Ernest, Legal Tutrix of the minor, Mary S. Burbank, Defendant in Error. Petition for Writ of Error. (Signed) A. E. Billings. (Signed) Rice & Montgomery, Att'ys for Plaintiffs in Error, petitioners. Filed Nov. 20, 1911. (Signed) Paul E. Mortimer, Clerk.

Assignment of Errors.

Supreme Court of Louisiana.

Nos. 18599 and 19122.

SUCCESSION OF T. SCOTT BURBANK.

And now comes Anna M. Burbank, wife of James M. Woodson, and the said James M. Woodson, Executors of the last Will and Testament of T. Scott Burbank, and individually and praying for a writ of error from the final decree rendered herein, in a cause wherein these assignors were plaintiffs and Mrs. Josephine Ernest, legal tutrix of the minor, Mary S. Burbank, was defendant and opponent, say that in the record in this cause and in the final decree herein, there is manifest error in the following, among other particulars:

First. Because the Court erred in finding that the deceased, T. Scott Burbank, was without right to change his domicile, at will, in derogation of the 14th. Amendment to the Constitution of the United States, establishing that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,"

343 and that no State shall "deprive any person of life, liberty, or property without due process of law;

And, also, of Section 2, of Article 4, of the Constitution: "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."

Second. Because the Court erred in finding that the deceased, T. Scott Burbank, was legally disqualified from leaving the State of Louisiana, permanently, and acquiring a domicile in the State of Texas, without first surrendering his trust, as one of the Executors of the Succession of his deceased father, Edward W. Burbank's Will, rendering an account of his administration, paying the balance due, if any—the same being in derogation of the Fourteenth Amendment to the Constitution of the United States and of section 2 of Article 4 of said Constitution.

Third. Because the Court erred in finding that the deceased, T. Scott Burbank, was legally disqualified from leaving the State of Louisiana permanently, without first surrendering his trust, as one of the Executors of the Succession of his father, Edward W. Burbank, and establishing thereafter his permanent domicile in the State of Texas, because of having on say the 9th. day of April, 1910, executed his power of attorney, under the provisions of Article 1154 of the Civil Code of Louisiana, which provides that "the Curator, Administrator, or executor who wishes to be absent for a time, ought not to lose the administration of the Succession on that account; provided, he leave with some person residing in the parish, his general and special power of attorney, to represent him in all the acts of his administration, and deposit an authentic copy of his power of attorney, before departure, in the office of the Recorder of Mortgages in and for the parish where such succession has been opened, which power of attorney shall be duly registered",—in derogation of the Fourteenth Amendment of the
244 Constitution of the United States and of section 2 of Article 4 of said Constitution.

Fourth. Because the Court erred in refusing, in derogation of Article 4, Section one of the Constitution of the United States, to give full faith and credit to the judgment of the Court of Probate, of Bell County, State of Texas, a competent Court, having jurisdiction of the place of domicile of T. Scott Burbank, deceased, copy of which proceedings duly exemplified according to the laws of the United States, were filed and in evidence herein.

Fifth. Because the Court erred in refusing the application of plaintiffs in error for the registration of the last Will and Testament of the deceased, T. Scott Burbank, and ordering its execution,—it being established that said Will and Testament had already been duly proved and admitted to probate and execution before a competent judge of the County of Bell, State of Texas, the domicile of the testator, and where the said last Will and Testament was received.

Sixth. Because in this cause and Court there was drawn in question the construction of Sections one and two of Article four of, and of the Fourteenth Amendment to, the Constitution of the United States, and the decision was against the title, rights, and privileges specially set up and claimed under said clauses of the Amendment by plaintiff in writ.

Seventh. Because the Court erred in holding that, at the time of making his last Will, and thereafter to his death, the testator, T. Scott Burbank, was not lawfully domiciled at Temple, Bell County, State of Texas.

Eighth. Because the Court erred in holding that at the time of making his last Will, and thereafter to his death, the testator, T. Scott Burbank, was lawfully domiciled in the State of Louisiana.

345 Ninth. Because the Court erred in finding that the minor, Mary Springer Burbank's domicile was or is in the State of Louisiana and not in the State of Texas.

Tenth. Because the Court erred in disregarding the testimony tending to establish the lawful domicile of the testator, T. Scott Burbank, to have been in Texas, before and at the time of making his last Will, and thereafter to his death.

Eleventh. Because the Court erred in holding that the Estate of the decedent, T. Scott Burbank, was when his Will, made, executed, admitted to probate, in a competent Court of the deceased's domicile in Texas, and presented to the Civil District Court for the Parish of Orleans, for registration and execution, on June 22, 1910, in custodia legis, and under the lawful administration of Mrs. Josephine Ernst, as tutrix of her granddaughter, Mary Springer Burbank.

Twelfth. Because the Court erred in finding that the declaration of the testator in his last Will, made of March 22nd, 1910, to-wit: "I hereby declare and state that my residence is in the County of Bell and State of Texas, which is my permanent home, and that I am a citizen of the State of Texas", were "unnecessarily repeated in the Will itself and are calculated to create a suspicion that he was making up a fictitious case of domicile."

Thirteenth. Because it was error in the Court condemning the defendant Executors to the payment of costs.

Wherefore, they pray that the said decree be reversed and the Honorable the Supreme Court of Louisiana be instructed to enter such decree as is prayed for by them in their petition, and that they have such other assistance and relief as they are entitled in law to have.

(Signed) A. E. BILLINGS,
(Signed) RICE & MONTGOMERY,
Of Counsel for Plaintiffs in Error.

346 (Endorsed:) Nos. 18,599 & 19,122. Consolidated. Supreme Court of Louisiana. Succession of T. Scott Burbank. Annie M. Burbank, wife of James M. Woodson, and James M. Woodson, Executors of the last Will of T. Scott Burbank and individually, Plaintiffs in Error vs. Mrs. Josephine Ernest, Legal Tutrix of the minor Mary S. Burbank Assignment of Errors. (Signed) A. E. Billings, (Signed) Rice & Montgomery, Attorneys for Plaintiffs in Error. Filed Nov. 20, 1911. (Signed) Paul E. Mortimer, Clerk.

Copy of Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable the Judges of the Supreme Court of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Louis-

iana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled the Succession of T. Scott Burbank—between Anna M. Burbank, wife of James M. Woodson, and the said James M. Woodson, Executors of the last will of T. Scott Burbank and individually, plaintiffs in Error, and Mrs. Josephine Ernst, Legal Tutrix of the Minor, Mary Springer Burbank, defendant, and defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said
347 State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Anna M. Burbank, wife of James M. Woodson, and said James M. Woodson, Executors of the last Will of T. Scott Burbank and individually, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Edward D. White, Chief Justice of the said Supreme Court, the 4th day of December, in the year of our Lord one thousand nine hundred and eleven.

(Signed) H. J. CARTER,
[SEAL.] *Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.*

348 Allowed by,
(Signed) JOS. A. BREAUX,
[SEAL.] *Chief Justice.*

(Endorsed:) Supreme Court of Louisiana. Nos. 18,599 and 19,122. (Consolidated) Succession of T. Scott Burbank. Anna M. Burbank, wife of James M. Woodson, and James M. Woodson, Executors and individually, Plaintiffs in Writ of Error, Versus (Writ of Error) Mrs. Josephine Ernest, Legal Tutrix of the Minor Mary S. Burbank, defendant in Error. Copy of Writ of Error lodged in

the Clerk's Office of the Supreme Court of Louisiana, in pursuance of the statute in such cases made and provided, this 4th day of December one thousand nine hundred and eleven. (Signed) A. E. Billings, (Signed) Rice & Montgomery, Attorneys for Plaintiffs in Error. Filed Nov. 20, 1911. (Signed) Paul E. Mortimer, Clerk.

Bond for Writ of Error.

Know all men by these presents, That we James M. Woodson, and Anna M. Woodson, his wife, executors of last will of T. Scott Burbank, and individually, as principals, and Charles Janvier, as sureties, are held and firmly bound unto Mrs. Josephine Ernst as legal tutrix the minor Mary Springer Burbank, and Nellie G. Dodge, wife of Wm. R. Dodge, in the full and just sum of One thousand dollars to be paid to the said Mrs. Josephine Ernst legal tutrix of said Minor, and Nellie Grant Burbank, wife of William R. Dodge, their certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 4th day of December, in the
849 year of our Lord one thousand nine hundred eleven.

Whereas, lately at a Session of the Supreme Court of Louisiana holden session in and for the State of Louisiana, in a suit depending in said Court, entitled The Succession of T. Scott Burbank, numbered 18,599 and 19,122 of the docket of said Court—between said principals, as plaintiffs, and Mrs. Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank, defendant, and opponent, a final judgment was rendered against the said James M. Woodson, and Anna M. Woodson, his wife, as Executors of said last will and individually and the said James M. Woodson, and Anna M. Woodson, his wife, having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the said final judgment in the aforesaid suit, and a citation directed to the said Mrs. Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank, and to the said Nellie G. Dodge, wife of William R. Dodge, and said William R. Dodge, citing and admonishing them to be and appear before the Supreme Court of the United States, to be holden at Washington, District of Columbia, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said James M. Woodson, and Anna M. Woodson, his wife, Executors as aforesaid, and individually, shall prosecute said Writ of Error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JAMES M. WOODSON. [SEAL.]
(Signed) ANNA M. WOODSON. [SEAL.]
Signed) CHARLES JANVIER. [SEAL.]

I authorize my wife,
(Signed) JAMES M. WOODSON.

Sealed and delivered in presence of—
——— ———.

Approved by—
(Signed) JOS. A. BREAUX,
[SEAL.] *Chief Justice.*

350 (Endorsed:) Supreme Court of Louisiana—Nos. 18,599 and 19,122—Succession of T. Scott Burbank. Anna M. Burbank, wife of James M. Woodson, and James M. Woodson, Executors, and individually, Plaintiffs in Error, vs. Mrs. Josephine Ernst, legal tutrix of the Minor, Mary Springer Burbank, Defendant in Error. (Bond). Filed Dec. 4, 1911. (Signed) Paul E. Mortimer, Clerk.

351 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled the Succession of T. Scott Burbank, between Anna M. Burbank, wife of James M. Woodson, and the said James M. Woodson, executor of the last will of T. Scott Burbank, & individually, plaintiffs in error, and Mrs. Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank, defendants & defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in ques-
351½ tion the construction of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Anna M. Burbank, wife of James M. Woodson, and said James M. Woodson, executors of the last will of T. Scott Burbank & individually as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to-

gether with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Edward D. White, Chief Justice of the said Supreme Court, the 4th day of December, in the year of our Lord one thousand nine hundred and eleven.

[Seal U. S. Circuit Court of the 5th Circuit & Eastern Dist.]

H. J. CARTER,
Clerk of the Circuit Court of the United States, for the Eastern District of Louisiana.

Allowed by

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice.

[Endorsed:] Supreme Court of Louisiana. Nos. 18599 & 19122 (Consolidated). Succession of T. Scott Burbank. Writ of Error. Anna M. Burbank, wife of James M. Woodson, & James M. Woodson, executors & individually, plaintiffs in writ of error, versus Mrs. Josephine Ernst, legal tutrix of the minor, Mary S. Burbank, defendant in error. Writ of Error lodged in the Clerk's Office of the Supreme Court of Louisiana, in pursuance of the statute in such cases made and provided, this 4th day of December one thousand nine hundred and eleven. A. E. Billings, Rice & Montgomery, Attorneys of Plaintiffs in Error. Filed Nov. 20, 1911. Paul E. Mortimer, Clerk.

352 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to Mrs. Nellie G. Dodge, wife of William R. Dodge, & said William R. Dodge, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Louisiana at New Orleans, in a cause entitled Succession of T. Scott Burbank, Nos. 18599 and 19122 (Consolidated) of the Docket of the Supreme Court of Louisiana, wherein Anna M. Woodson, wife of James M. Woodson, and said James M. Woodson, executors of the last will of T. Scott Burbank, & individually, are plaintiffs in

ror and Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 4th day of December, in the year of our Lord one thousand nine hundred and eleven.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice of the Supreme Court of the State of Louisiana.

Service accepted.

MRS. NELLIE G. DODGE,
By ZACH SPEARING, *Att'y.*

[Endorsed:] Supreme Court of the State of Louisiana. Nos. 18599, 19122. Succession of T. Scott Burbank. Anna M. Burbank, wife of James M. Woodson, and James M. Woodson, executors & individually, plaintiffs in error, vs. Mrs. Josephine Ernst, legal tutrix of the minor, Mary S. Burbank, defendant in error. Citation. Sheriff's return. Filed Dec. 4, 1911. Paul E. Mortimer, Clerk.

353 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to Mrs. Josephine Ernst, legal tutrix of the minor, Mary Springer Burbank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Louisiana at New Orleans, in a cause entitled Succession of T. Scott Burbank, Nos. 18599 & 19122 (Consolidated) of the Docket of the Supreme Court of Louisiana, wherein Anna M. Woodson, wife of James M. Woodson & said James M. Woodson, executors of the last will of T. Scott Burbank, & individually, are plaintiffs in error, and Josephine Ernst legal tutrix of the minor, Mary Springer Burbank, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the

Supreme Court of the United States, this 4th day of December in the year of our Lord one thousand nine hundred and eleven.

[Supreme Court of the State of Louisiana.]

JOSEPH A. BREAUX,
Chief Justice of the Supreme Court of the State of Louisiana.

[Endorsed:] Supreme Court of the State of Louisiana. No. 18599 & 19122, Consolidated. Succession of T. Scott Burbank. Anna M. Burbank, wife of James M. Woodson, & said James M. Woodson, executors and individually, plaintiffs in error, vs. Mrs. Josephine Ernst, legal tutrix of the minor Mary S. Burbank, defendant in error. Citation. Sheriff's return. Filed Dec. 4, 1911. Paul E. Mortimer, Clerk.

Service of this citation accepted on behalf of Josephine Ernst, legal tutrix of the minor Mary Springer Burbank.

New Orleans, Dec. 5, 1911.

DART, KERNAN & DART,
Att'ys for said Tutrix.

354 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that the foregoing three-hundred-fifty (350) pages, are a true and faithful copy of some of the proceedings had in the Civil District Court, for the Parish of Orleans, in a certain suit entitled Succession of T. Scott Burbank, No. 93,752 of the docket of the Civil District Court, and No. 18,599 of the docket of the Supreme Court of Louisiana;

Also, a true and faithful copy of certain "Certified Extracts" from record entitled: Succession of E. W. Burbank, No. 88,241 of the docket of the Civil District Court, Parish of Orleans, and filed in the Supreme Court on April 17th, 1911, in cause No. 93,752 of the docket of the Civil District Court, and number 18,599 of the docket of the Supreme Court;

Also, a true and faithful copy of transcript of appeal No. 93,752 of the docket of the Civil District Court, entitled Succession of T. Scott Burbank, and filed in the Supreme Court of the State of Louisiana, on October 6th, 1911, under the No. 19,122, and ordered, on October 7th, 1911, by the Supreme Court, to be consolidated with appeal No. 18,599 in the cause entitled: Succession of T. Scott Burbank;

And, also, of certain of the proceedings had in this Honorable Court on the appeal taken by Anna M. Burbank, wife of James M. Woodson, and James M. Woodson, Executors, which appeal is now on the files thereof under the Nos. 18,599 and 19,122, Consolidated.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court, at the City of New Orleans, this the 19th day of December, Anno Domini, one thousand nine hundred and eleven, and of the Independence of the United States of America, the one hundred and thirty-sixth.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER, *Clerk.*

355 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Joseph A. Breaux, Chief Justice of the Supreme Court of the State of Louisiana, do hereby certify that Paul E. Mortimer is Clerk of the Supreme Court of the State of Louisiana; that the signature of Paul E. Mortimer to the foregoing certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal, at the city of New Orleans, this the 19th day of December, Anno Domini, one thousand nine hundred and eleven.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice.

356 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana hereby certify that the Supreme Court of the State of Louisiana is the highest Court of law in Louisiana, and that the Honorable Joseph A. Breaux, is the Chief Justice of said Court and that his signature to the above certificate is genuine.

In witness whereof I hereunto set my hand and the seal of the Court aforesaid, at the city of New Orleans, this 19th day of December, A. D. one thousand nine hundred and eleven.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER, *Clerk.*

Endorsed on cover: File. No. 22984. Louisiana, Supreme Court. Term No. 151. Anna M. Burbank, wife of James M. Woodson, and James M. Woodson, executors of the last will of T. Scott Burbank, and individually, plaintiffs in error, vs. Mrs. Josephine Ernst, legal tutrix of the minor Mary Springer Burbank et al. Filed December 26, 1911. File No. 22984.

United States Supreme Court.

OCTOBER TERM, 1913.

ANNA M. BURBANK, Wife of James M. Woodson, and JAMES M. WOODSON, Executors of the Last Will of T. Scott Burbank, and Individually,
Plaintiffs in Error,

versus

MRS. JOSEPHINE ERNST, Legal Tutrix of the Minor, Mary Springer Burbank, *et Al.*,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

Edward W. Burbank, of New Orleans, died there December 23, 1908. His last will designated his son, T. Scott Burbank, and his two daughters, Mrs. Da Silva and Mrs. Dodge, as his executors. Scott Burbank and Mrs. Dodge were residents of New Orleans, and Mrs. Da Silva, of Rock Island, Ill. They qualified, and without further administration than taking and filing an inventory, T. Scott Burbank and Mrs. Da Silva, joined by their sister, Mrs. Wood-

son, of Texas, applied for judgment of court recognizing them as forced heirs of their father and putting them into possession, as owners, of their undivided one-fourth shares of his succession. Mrs. Dodge opposed successfully, in the lower court, the application; but the judgment, on appeal, was, by the Supreme Court of Louisiana, reversed, and the judgment prayed for by them was rendered on April 11, 1910; retaining, however, the executors in office for reasons specified.

126 La. An. 9, 11.

Pending these proceedings, on April 8, 1909, Scott Burbank and Mrs. Da Silva executed a power of attorney, as required of an executor about to leave the State temporarily, appointing an agent, general and special, conformably to Article 1153 of the Civil Code of Louisiana (Transcript of Record, pp. 171-173), and Burbank left the State and never returned. He died, by his own hand, in Temple, Texas, on May 10, 1910, leaving there a minor child, Mary Springer Burbank, and leaving a last will, made there on March 22, 1910—which was duly admitted to probate in the County Court of Bell County (in which was Temple) on June 22, 1910.

A duly exemplified copy of the record is in evidnece in the instant proceedings (pp. 15-28.)

Therein (pp. 18 and 19) he says:

> CLAUSE 8. "I declare and state that my resi-
> "dence is in the County of Bell and State of Texas,
> "which is my permanent home, and that I am a citi-
> "zen of the State of Texas."

This exemplified copy was presented and filed in the Civil District Court for the parish of Orleans, with prayer that the will be duly registered; they (these plaintiffs in

error) recognized as executors of the will, on filing inventory, giving bond, etc., as required by law, with power to administer as ancillary to the principal administration then being had in the court of Texas (p. 13).

This application was made pursuant to the following articles of the Civil Code of Louisiana:

> "ART. 1688. Testaments made in foreign coun-"tries, or other States of the Union, cannot be car-"ried into effect on property in this State without "being registered in the court within the jurisdic-"tion of which the property is situated, and the exe-"cution thereof ordered by the Judge.
>
> "ART. 1689. This order of execution shall be "granted without any other form than that of regis-"tering the testament, if it has been established that "the testament has been duly proved before a com-"petent Judge of the place where it was received."

Meantime, Mrs. Josephine Ernst, the maternal grandmother of the minor, filed her petition on June 10, 1910, (p. 4), claiming the tutorship of the minor, and was appointed as her legal tutrix on June 17th.

C. C. Art. 266:

> "The grandmother of the minor is the only "woman who has the right to claim the tutorship by "effect of the law, but she is not compelled to ac-"cept it."

On June 10, 1910, Chas. S. Rice, Esq., appearing as *amicus curiae* (the will of Burbank being not yet proved in Texas), and, in writing, gave the Court to understand that at the time of his death, on May 10th, T. Scott Burbank was a resident of and domiciled in the State of Texas, and

that his last will had been presented for probate in the proper court of that State, and that a copy of the probate proceedings, as well as of the appointment of a guardian for the minor child of the deceased, would, within a brief delay, be produced for the opening of deceased's succession in the Louisiana court, and to have the minor legally represented; that the Court was without jurisdiction to appoint a tutor to the child, and that he filed his appearance "in "order to the avoidance of confusion and the inadvertent "doing of acts beyond its authority and jurisdiction."

See, also, letter of protest in the same behalf, addressed to W. McL. Fayssoux, notary, before whom a family meeting had been called at the instance of Mrs. Dodge, the minor's aunt, for the purpose of nominating a tutor to the minor (pp. 8, 9).

These appearances as *amicus curiae* were filed in the hope of preventing unseemly confusion until the exemplified record from the Texas court could be produced and filed.

On the same day as the filing by plaintiffs in error of their petition for recognition (p. 14), Mrs. Ernst filed answer and objections thereto (p. 30)—among other grounds averring that

> "T. Scott Burbank, at the time of his death, was "a resident of the City of New Orleans and State "of Louisiana, and a citizen of the latter State, and "was not a resident of the State of Texas, nor a citi- "zen thereof, nor had he ever been domiciliated "therein."

Five days later, she filed her petition (p. 31), elaborating the grounds of her answer, as above, reiterating the allegation that Burbank's domicile was in New Orleans, and that he was a citizen of Louisiana and never had had any other residence as domicile.

The other objections in the answer and allegations in the petition are not here noticed, because they were either rejected or unnoticed in the later opinions of both the lower and upper Courts.

In his written opinion, his Honor of the Civil District Court, having found that there were certain dispositions in the will contrary to the law of Louisiana, said (p. 183):

> "The Court does not feel disposed to recognize "the executors of a foreign will, whose duty it is "under the will to enforce or attempt to enforce cer- "tain provisions thereof violative of the established "policy of the State."

Page 184:

> "Burbank had established a domicile in this city, "but for some reason became tired of living in this "city, and **unquestionably endeavored to make a "change of *domicile*.** The motive which inspired "this desire is of no concern, provided he did actu- "ally, affirmatively and legally make a new domicile. "The motive may have been a mere whim or caprice "or a special desire and ***intent*** to establish another "domicile for the express purpose of evading the "operation of the laws of the State upon his prop- "erty.
>
> "The latter question was decided affirmatively "in the matter of the *Succession of Mrs. Newcomb*, "the benefactress of the Female Institute in this city. "She consulted counsel in making the change of her "domicile, and her actions were subsequently affirmed "by the Court. (*Newcomb*, 192 N. Y. Court of Ap- "peal, p. —.)"

Page 185:

> "The evidence in this case shows that T. Scott "Burbank became dissatisfied with his residence and "domicile in this parish; that in December, 1908, or

"the early part of 1909, he qualified as one of the "executors of the estate of his father, which he con- "tinued to hold until his death, in Texas, May 10, "1910. This dissatisfaction was first actively shown "by his shipping some movable property to Rock "Island, Ill., and his declaration that he **intended** "to establish his **domicile** there, where his daughter "was, and where his sister, Mrs. Da Silva, was."

The opinion then recites the execution of the power of attorney hereinbefore referred to, and proceeds:

"Moreover, he did not actually establish his "domicile in Illinois, **but found the climate too** "**rigorous**; he left in February, 1909 [*sic*, 1910], for "Bell County, Texas, where his other sister, Mrs. "Woodson, lived, **taking his daughter with him.** "He there consulted counsel, and on the 22nd of "March, 1910, made the will in question, and de- "clared in paragraph 8 that his residence and per- "manent home **(and, therefore, his domicile)** was "in Bell County.

"Scott Burbank committed suicide on the 10th "of May, 1910, and between that time and the mak- "ing of the will he industriously circulated by words "his **intention** to make the Town of Temple his domi- "cile, even indicating his purpose to build his home "there, near his sister, Mrs. Woodson."

But his Honor held that, **because** he retained the executorship "by proper method and in authentic act," he was "estopped by his own act in our Court" from acquiring a domicile elsewhere.

The judgment following decreed the will and testament in question to be "not such as can be registered, exe- "cuted or given effect in the State of Louisiana," and rejected "the **demand** of said Mrs. Anna Woodson and her

"husband, J. M. Woodson, at their costs" (p. 186); which demand was (p. 14) that they be recognized as executors of Burbank's will; that the will be duly registered; and that, upon filing an inventory and giving bond as required by law, they be recognized as executors of the will of deceased, with power to administer—all in conformity to Articles 1688 and 1689 of the Code, above cited.

Thereupon they applied for a new trial on the grounds, amongst others:

> "SECOND. That the judgment contravenes Arti-
> "cle IV, Section 4, of the Constitution of the United
> "State, by denying full faith and credit to the judi-
> "cial proceedings had in the County Court of the
> "State of Texas, in proof, probate of the last will
> "and testament of said deceased, judgment for exe-
> "cution thereof, and in recognition [and] confirma-
> "tion of the executors thereunder.
>
> "THIRD. Said judgment contravenes the Four-
> "teenth Amendment to the Constitution of the
> "United States, by denying the right of deceased, a
> "native-born citizen of the United States, to estab-
> "lish a domicile in the State of Texas; and of Arti-
> "cle IV, Section 2, of said Constitution, by denying
> "to deceased, a citizen of the State of Texas, the
> "privileges and immunities to which the citizens of
> "Louisiana are entitled."

The application was refused (p. 188), and from the judgment rendered plaintiffs in error appealed to the Supreme Court of the State.

In its opinion the Supreme Court, among other things, said (p. 210):

> "Soon after the execution of said procuration, T.
> "Scott Burbank left New Orleans and went to the

"home of his sister, Mrs. Da Silva, in Illinois. There "he remained **with his child** until February 10, 1910, "when he left for Temple, Texas, the home of his "other sister, Mrs. Woodson, with whom he resided "until his death by suicide on May 10, 1910. On "March 22, 1910, Burbank made the will in contro- "versy, which contains the following sentence—to "wit: 'I hereby declare and state that my residence " 'is in the County of Bell and State of Texas, **which** " **'is my permanent home,** and that I am a citizen of " 'the State of Texas.' **That Burbank actually re- "sided in Texas is conceded.** That he really in- "**tended** to make that place his home or domicile is "denied. Burbank had been for several years in bad "health. A part of his skull had been removed to re- "lieve paralysis resulting from an abscess on the "brain caused by a very severe attack of catarrh. "After spending some time at the home of his sis- "ter, Mrs. Da Silva, in Illinois, **Burbank resolved to "seek a milder climate,** and in February, 1910, left "for Temple, Texas, to visit his sister, Mrs. Woodson. "On March 4, 1910, he wrote to Mrs. Da Silva, from "Temple, Texas, as follows: **'I intend to make this** " **'my home;** so you can send me my bank box and "'money that I have there, and the photographs that " 'are in my room. Send the box by express and the " 'key by registered mail. **I like it down here, and** " **'feel better since I came.'**

"Burbank declared to the attorney who drafted "the will and other witnesses that Temple was his "permanent home. **The Texas Court, after hearing "testimony, decreed that the permanent domicile "of the deceased was in the County of Bell, State "of Texas, and that he left an estate situated and "located in said county and State, and subject to "the jurisdiction of the Court.**

* * * * * * *

"Burbank could not have lawfully left the "State permanently without first surrendering his "trust, rendering an account, paying the balance due, "if any."

Citing, in support, C. C. Art. 1153.

Referring to the Court's own syllabus, quoted below (p. 211), as showing the exact scope of its refusal to give "full faith and credit" to the judgment of the Court of Texas, it is that:

"During the life of the procuration, the execu- "tor is considered as present in the State, through "his accredited representative, and is concluded in "the Courts of Louisiana from *asserting* a change "of domicile to another jurisdiction; and the execu- "tors of a will made by him are in no better posi- "tion Such a will must be probated in the State of "Louisiana as in case of wills of residents of that "State."

The syllabus, which, as above, is confected by the Supreme Court, in Louisiana, contains, in brief, the grounds of that Court's decree, from which is prosecuted the present writ of error, and is as follows:

"Under C. C. 1154, a resident executor cannot "lawfully absent himself, even for a limited time from "the State, without first executing and recording a "procuration appointing a resident agent to represent "him in all the acts of the administration. Where such "a procuration expressly declares that the executor "intends to depart temporarily from the State, such "intent is conclusively presumed to continue until "the procuration is revoked or recalled. During the "life of the procuration the executor is considered as "present in the State, through his accredited repre- "sentative, and is concluded in the Courts of Louisi-

> ana from asserting a change of domicile to another "jurisdiction; and the executors of a will made by "him out of the State, are in no better position. Such "a will must be probated in the State of Louisiana as "in the case of wills of residents of the State."

In the body of the opinion, it will be noted, the Court declared that "Burbank could not have lawfully left the State "permanently without first surrendering his trust, render- "ing an account of his administration, paying the balance "due, if any. (C. C. 1153.)"

So holding, the Court ordered a nonsuit on the application for probate (p. 211).

Thereupon, plaintiffs in error (appellants below) applied for a rehearing (p. 212); which was overruled (p. 214).

In other words, what was decided by the Supreme Court was that the deceased, whatever his efforts to acquire a domicile in Texas, could not do so, so long as the administration of his father's succession was not closed and the procuration he had given on April 9, 1909, remained unrevoked.

Such, also, must have been the view of defendant in error, who complained of the decree to the extent of asking a rehearing on the ground that "the decree, as framed, would "not support the plea of *res judicata* upon any of the issues "litigated and decided [*sic*] in this case" (p. 213).

These plaintiffs then applied for a writ of error to bring their cause to this tribunal, and assigned as errors the following:

FIRST. Because the Court erred in finding that the deceased, T. Scott Burbank, was without right to change his

domicile, at will, in derogation of the Fourteenth Amendment to the Constitution of the United States, establishing that "all persons born or naturalized in the United States, "and subject to the jurisdiction thereof, are citizens of the "United States and of the State wherein they reside," and that no State shall "deprive any person of life, liberty, or "property without due process of law.

And, also, of Sectian 2 of Article 4, of the Constitution:

> "The citizens of each State shall be entitled to "all privileges and immunities of citizens of the sev- "eral States."

SECOND. Because the Court erred in finding that the deceased, T. Scott Burbank, was legally disqualified from leaving the State of Louisiana, permanently, and acquiring a domicile in the State of Texas, without first surrendering his trust, as one of the executors of the succession of his deceased father, Edward W. Burbank, rendering an account of his administration, paying the balance due, if any—the same being in derogation of the Fourteenth Amendment to the Constitution of the United States and of Section 2 of Article 4 of said Constitution.

THIRD. Because the Court erred in finding that the deceased, T. Scott Burbank, was legally disqualified from leaving the State of Louisiana permanently, without first surrendering his trust, as one of the executors of the succession of his father, Edward W. Burbank, and establishing thereafter his permantnt domicile in the State of Texas, because of having on, say, the 9th day of April, 1910, executed his power of attorney, under the provisions of Article 1154 of the Civil Code of Louisiana, which provides that "the cura- "tor, administrator, or extcutor who wishes to be absent for

"a time, ought not to lose the administration of the suc-"cession on that account; provided, he leave with some per-"son residing in the parish, his general and special power "of attorney, to represent him in all the acts of his admin-"istration, and deposit an authentic copy of his power of at-"torney, before departure, in the office of the Recorder of "Mortgages in and for the parish where such succession has "been opened, which power of attorney shall be duly regis-"tered"—in derogation of the Fourteenth Amendment of the Constitution of the United States and of Section 2 of Article 4 of said Constitution.

FOURTH. Because the Court erred in refusing, in derogation of Article 4, Section 1, of the Constitution of the United States, to give full faith and credit to the judgment of the Court of Probate of Bell County, State of Texas, a competent Court, having jurisdiction of the place of domicile of T. Scott Burbank, deceased, copy of which proceedings, duly exemplified according to the laws of the United States, were filed and in evidence herein.

FIFTH. Because the Court erred in refusing the application of plaintiffs in error for the registration of the last will and testament of the deceased, T. Scott Burbank, and ordering its execution—it being established that said will and testament had already been duly proved and admitted to probate and execution before a competent Judge of the County of Bell, State of Texas, the domicile of the testator, and where the said last will and testament was received.

SIXTH. Because in this cause and court there was drawn in question the construction of Sections 1 and 2 of Article 4 of, and of the Fourteenth Amendment to, the Con-

stitution of the United States, and the decision was against the title, rights and privileges especially set up and claimed

SEVENTH. Because the Court erred in holding that, at the time of making his last will, and thereafter to his death, the testator, T. Scott Burbank, was not lawfully domiciled at Temple, Bell County, State of Texas.

EIGHTH. Because the Court erred in holding that at the time of making his last will, and thereafter to his death, the testator, T. Scott Burbank, was lawfully domiciled in the State of Louisiana.

NINTH. Because the Court erred in finding that the minor, Mary Springer Burbank's domicile was or is in the State of Louisiana and not in the State of Texas.

TENTH. Because the Court erred in disregarding the testimony tending to establish the lawful domicile of the testator, T. Scott Burbank, to have been in Texas, before and at the time of making his last will, and thereafter to his death.

ELEVENTH. Because the Court erred in holding that the estate of the decedent, T. Scott Burbank, was, when his will was made, executed, and admitted to probate in a competent court of the deceased's domicile in Texas, and presented to the Civil District Court for the Parish of Orleans, for registration and execution, on June 22, 1910, in *custodia legis*, and under the lawful administration of Mrs. Josephine Ernst, as tutrix of her granddaughter, Mary Springer Burbank.

TWELFTH. Because the Court erred in finding that the declaration of the testator in his last will, made on March 22, 1910, to wit: "I hereby declare and state that my resi-

"dence is in the County of Bell and State of Texas, which "is my permanent home, and that I am a citizen of the State "of Texas," were "unnecessarily repeated in the will itself "and are calculated to create a suspicion that he was making "up a fictitious case of domicile."

Carran vs. O'Callighan, 125 F. 657:

> "Syl. A, Federal Court of Equity, is without "jurisdiction in a suit to set aside the probate of a "will, unless by the law of the State a suit in equity "for the purpose may be maintained, in which case a "nonsuit may be maintained in a Federal Court, "where the requisite diversity of citizenship or other "jurisdictional facts exist."
>
> Ct. App., 9th Circ. Text. Citing the *Broderick case*, 21 Wal. 503-509.

It appears from the record that Scott Burbank, after executing the power of attorney herein referred to (p. 171 of Record of Appeal), absented himself from the State, and never returned—his death occurring more than a year thereafter.

Code of Practice, Art. 1153, provides that

> "The curator of a vacant succession [applicable, "also, to executor] * * * who wishes to absent "himself from the State for a time exceeding one "year, must cause his place to be filled by some other "and render an account of his administration,"—un- "der penalty (C. C. 1158) of being dismissed by the Judge who has appointed him."

There is no other penalty for his absence prescribed by the law of Louisiana that we are aware of; certainly none that prescribes that he may—having so left the State, be perpetually disqualified from establishing a domicile in a

different State, until his administration is completed, or the power of attorney given by him under Article 1154 of the Code, cancelled.

In the *Matter of Mrs. Newcomb*, 192 N. Y. Ct. of App. 238 *et seq.*, cited by his Honor of the Civil District Court, it was declared that **"a person may select and make his own domicile, and no one may let or hinder;** that

> "the right to choose implies the right to declare one's "choice, formally or informally, as he prefers, and **"even for the purpose of making evidence to prove "what his choice was.** Such declarations are not **"self-serving** in an improper sense, unless they are "made with the intent to deceive."

The good faith of Burbank is shown by the evidence of many witnesses, who could have no motive to assist him in any purpose to deceive: Of Woodson, p. 40 *et seq.;* 98; of Dr. Da Silva, p. 85 *et seq.;* of Mrs. Da Silva, p. 65 *et seq.;* of Mrs. Woodson, p. 83 *et seq.;* of Billings (his attorney in New Orleans) ; all taken in New Orleans; that of Rowland, p. 134; of Willis, p. 135; of Hodges, p. 137; of Murphy, pp. 138, 139; of Israel, p. 140; of Cox, p. 142; of Dr. Gober, pp. 145, 146; of Scott, p. 147; of Erskine, p. 148; of Black, p. 149; of Clara Willis, pp. 150, 151; of Campbell, pp. 153, 154; of Woodson *pere,* pp. 155, 156; and of his attorney, Judge W. S. Ranks, pp. 157-159—all of whose depositions were taken at Temple, Texas, under commission from the Civil District Court for this parish.

From the testimony of one of Burbank's attorneys in New Orleans (p. 112 *et seq.*), it appears that Burbank had been for the previous fifteen years to his father's decease, manager of his father's plantation, in the Parish of Assumption; that he had during that time no home or domicile in

New Orleans; that he visited his father in New Orleans at intervals of two or three months, or oftener, consulting with his father, who had a desk in witness' office; that, for several months prior to March of 1908, he was often in New Orleans, for treatment for a virulent catarrh, remaining a day or two at a time—the upshot of which (more particularly described by Dr. Da Silva (p. —) and Dr. Woodson (p. —) was a severe surgical operation, described by the surgeon, Dr. Matas, p. 95 *et seq.*) ; that Burbank was a specially reserved and uncommunicative man; that in all, he was in New Orleans from February to June of 1908, and from the last of November, 1908 to April 11, 1909.

It appears, also, from the record that Mrs. Dodge, his only sister in New Orleans, had insisted upon having special counsel to represent her in the succession proceedings, and opposed and antagonized Burbank and her other sisters in the course of the settlement, and carried her opposition even to the Supreme Court of the State. (Pp. 1, 10, 11, 178, 191; 126 La. An. 9.)

Necessarily, Burbank, from his employment for the preceding fifteen years or more in another parish, had few acquaintances, and fewer friends, in New Orleans; he was a stranger in the solitude of a great city; was not in friendly relations with the only member of his family residing there; in frail health, resulting from his catarrh and the surgical operation had to relieve him, when, from the disease, he was paralyzed and unable to speak—and in imminent danger of death (p. 96) ; was in friendly relations with both his other sisters, Mrs. Da Silva, of Rock Island, Ill., and Mrs. Woodson, of Tyler, Bell County, Texas.

What more natural than that he should seek a *home* with his sister in Rock Island for himself and his motherless

daughter; and that, when winter came, he found the winter so severe, as to compel him to seek a milder climate and home in Texas—with no ulterior motive, except to establish a home there if the climate and conditions favored—for himself and child, who for more than a year prior to his death has never been in Louisiana.

If the question of fact is open to the Court, as we believe it is, we beg its attention thereto—believing that both the lower Court and the Supreme Court of the State were in error, in even the **reflections** made upon the **intention** of the deceased.

The very acts of Mrs. Newcomb, which were held to be appropriate and proofs of her **intention** to change her domicile (see 192 N. Y. Ct. of Appeals, 246 *et seq.*), are in the instant case considered as creative of suspicion.

So in *Verret vs. Bonvillain*, 33 La. An. 1307, it was said in a disputed case of domicile: "In fact, his words, if faithfully reported, would solve all doubt on the judgment"—besides much more to like effect, and **in point.**

This Court has refrained from defining what are the "privileges and immunities" intended by the article of the Constitution.

We submit that the reasoning in the case of *Paul vs. Virginia*, 8 Wal. 168, 180, is inclusive of the case at bar:

Again (p. 180):

> "It was undoubtedly the object of the clause in "question to place the citizens of each State upon the "same footing with citizens of other States, so far as "the advantages resulting from citizenship in those "States are concerned. It relieves them from the dis-"abilities of alienage in other States; it inhibits dis-"criminating legislation against them by other States;

"it gives them the right of free ingress into other "States, and egress from them; it insures to them in "other States the same freedom possessed by the citi- "zens of those States in the acquisition and enjoy- "ment of property and in the pursuit of happiness; "and it secures to them in other States the equal pro- "tection of their laws. It has been justly said that "no provision in the Constitution has tended so "strongly to constitute the citizens of the United "States one people as this.

"Indeed, without some provision of the kind re- "moving from the citizens of each State the disabili- ties of alienage in the other States, and giving them "equality of privilege with citizens of those States, "the Republic would have constituted little more than "a league of States; it would not have constituted the "Union which now exists."

We submit that the right to come and go, and to establish one's domicile when and where one will, is included in the "privileges" protected by the article.

The violation of Art. 4, Sec. 1, of the Constitution, refusing to give full faith and credit to the decree in probate of Burbank's will, seems so evident, and the words of the provision are so, by many decisions understood, that the assignment of error on that ground is submitted.

As a summary of what we believe to be the law of the case, applicable, we submit:

1.

The judgmen of a competent court of a sister State in probate of the will of a person domiciled within its jurisdiction, duly exemplified according to the laws of the United

States, is entitled to the full faith and credit it would have where rendered.

Art. 4, Sec. 1, Cons. U. S.; Suc. of Gaines, 45 An. 746; Suc. of Wedderburn, 1 Rob. 266; Willoughby on Cons. U. S., Sec. 95; Rev. Stat. of Texas, Arts. 1889, 1890; Act of Congress of 1790; Rev. Stat. U. S., Sec. 905; Dupre vs. Reggio, 6 La 653.

2.

On producing such exemplified copy to the Judge of the Louisiana Court, where property of the testator's succession is situated, it is the duty of such Judge to order the registry and execution of the will by the executors named.

C. C., Arts. 1688, 1689; Suc. of Gaines, 45 An. 746; Suc. of Wedderburn, 1 Rob. 266; State vs. Judge, 18 La. 570; Dixon vs. D'Armond, 23 An. 200; 17 La. 486; 18 La. 570; 2 Rob. 427; 13 La. 224; Matter of Newcomb, 192 N. Y. Ct. Ap. 242; Bonella and Caballero vs. Maduel, Test. Exr., 26 An. 112; 14 How (U. S.) 430.

3.

The right to change domicile at will is a right unrestricted and unrestrictible as to every person *sui generis;* and to judicially deny such right is in violation of the Fourteenth Amendment to the Constitution of the United States, and of Article IV, Section 2, thereof.

In Matter of Newcomb, 192 N. Y. Ct. Ap. 251, 252; Schouler on Executors, pp. 29, 30; Verret vs. Bouvillon, 33 An. 1306; Gravvillon vs. Richards, 13 La. 297.

4.

A person's domicile is where he has honestly established himself with intent to live, and the domicile is established instanter the intent and the actual living coincide; legnth of residence is not an essential element.

Gravillon vs. Richards, 9 La. 293; Schouler on Executors, pp. 29, 30; Verret vs. Bouvillon, 33 An. 1306, 1307.

5.

The evidence in the instant case establishes beyond reasonable doubt that the testartor's intention to establish a domicile in Texas was actual and *bona fide*, and that his residence in Texas was for the *bona fide* purpose of establishing a permanent home there for himself and minor child, and that such a domicile was established in fact and in law.

6.

The fact of being executor of a will does not estop the executor, while acting as such, from establishing a domicile elsewhere; such change of domicile may be ground for removal, but even such removal is not, like that of tutor, automatic.

7.

The appointment of a tutor by a Court in Louisiana to a minor domiciled in another State is void for want of jurisdiction, and the person so appointed is absolutely without right to represent such minor in judicial proceedings or otherwise.

Suc. of Cass, 44 An. 382, 384.

8.

The Court of the domicile of the testator is the only Court having jurisdiction to appoint a guardian or tutor to his minor children.

Suc. of Duncan, 13 An. 265; Civil Code, Art. 307; Brown vs. McNeil, 8 An. 30; Suc. of Bronson, 11 An. 24; Code of Practice, Arts. 1015, 1016; Suc. of Vennard, 44 An. 1076; State vs. Judge, 2 Rob. 160; Suc. of Stephens, 19 An. 500; Suc. of Cass, 44 An. 382, 384.

Taylor on "Jurisdiction and Procedure of the Supreme Court, page 338:

> "Three classes of cases are reviewable by the "Supreme Court on writ of error to a State Court: "(1) There must have been drawn in question the "validity a treaty or statute, or an authority exer- "cised under the United States, and the decision must "have been against the claim to maintain which either "was relied upon; (2) or there must have been drawn "in question a statute of, **or an authority exercised "under, a State,** upon the ground of repugnancy to "the Constitution or a law or treaty of the United "States; and the decision must have been in favor of "the validity of the State law or authority in ques- "tion; (3) or a **right must have been claimed under "the Constitution** or a law or treaty of the United "States; **or by virtue of** a commission held or author- "ity exercised by, the United States; and the decision "must have been **against** the right so claimed."
>
> Citing *Home Ins. Co., vs. Auguste,* 93 U. S. 116.
>
> "A case may be considered to arise under the "Constitution or a law of the United States when-

"ever its correct decision depends upon the construc-
"tion of either."

Cohen vs. Virginia, 6 Wheat. 375.

Page 339:

"To constitute a Federal question for review
"for a review by the Supreme Court, where there is
"drawn in question the validity of a Statute of, or an
"authority exercised under, any State, three things
"must concur to give the Supreme Court jurisdiction:
"(1) The validity of a statute of a State, **or of an**
"authority exercised under a State, must be drawn
"in question. (2) The validity of such statute or
"authority must be drawn in question upon the
"ground that they are repugnant to the Constitution,
"treaties or laws of the United States. (3) The de-
"cision of the State Court must be in favor of their
"validity."

Page 344:

"The construction of State statutes belongs to
"the State Courts, and is not a Federal question
"which the Supreme Court can revise on a writ of
"error to a State Court, ***unless*** the State Court gives
"such construction to a State statute as to make it
"in conflict with the Constitution or laws of the
"United States, and thereby deprives a party of his
rights under such Constitution or laws."

Phoenix Ins. Co. vs. The Treasurer, 11 Wall.
204.

Page 345:

"A stipulation in the charter of a railroad com-
"pany that it shall pay to the State a portion of its
"earnings is not repugnant to the Constitution of
"the United States. In an action by the State
"against the railroad company for the amount due
"under such stipulation, the alleged unconstitution-

"ality of the stipulation was set up in defense. The "State Court was bound to pass upon it, and, hav- "ing decided against the exemption thus claimed, "the Supreme Court was authorized to review the decision."

Balt. & O. R. R. Co. vs. Maryland, 21 Wal. 456.

Page 372:

"Article 4, paragraph 1, of the Federal Consti- "tution declares that 'full faith and credit shall be " 'given in each State to the public acts, records and " 'judicial proceedings of every other State.' "Whether a judgment or decree of one State has "received full faith and credit in a court of another "State presents a Federal question which gives the "Supreme Court jurisdiction to review the judg- "ment of such Court. * * * The Constitutional "provision above cited also ordains that 'the Con- " 'gress may, by general laws, prescribe the man- " 'ner in which such acts, records and proceedings " 'shall be proved, and the effect thereof.' Congress "has acted on this subject, and it is only through the "instrumentality of the statute that the clause of the "Constitution which the plaintiff in error relies on "can be invoked for his protection. A judgment of "another Court is duly authenticated by the attesta- "tion of the Clerk, with a certificate of the presiding "Justice that the attestation is in due form."

Caperton vs. Ballard, 14 Wal. 238; *Carpenter vs. Strange*, 141 U. S. 87; *Lynde vs. Lynde*, 181 U. S. 183; *Crapo vs. Kelley*, 16 Wal. 610.

"When duly pleaded and proved, such judg- "ments have the effect of being, not only ***prima facie*** "evidence, **but conclusive proof** of the rights there- "in adjudicated, and refusal to give them the force "and effect in this respect which they had in the "State in which they were rendered denies to a party

"a right secured to him by the Constitution and laws "of the United States."

Christmas vs. Russell, 5 Wal. 290; *Green vs. Van Buskirk*, 5 Wal. 307; *Mut. L. Ins. Co. vs. Harris*, 97 U. S. 331.

Page 382:

"A citizen of the United States residing in any "State of the Union is a citizen of that State. Where "the decision of the State Court involves the denial "of a right or privilege under the Constitution or laws "of the United States, **upon which the determina-"tion** as to whether or not plaintiff in error was a "citizen of the United States depends, the Supreme "Court has jurisdiction to review such decision "against such right or privilege."

Boyd vs. Nebraska, 143 U. S. 135.

Atchison, Topeka & Santa Fe Ry. Co. vs. Sowers, 213 U. S. 55:

Syl. 1:

"When the opinion of the State Court shows that "it considered and denied the validity of a statute "of another State, and its binding force to control "the right of action asserted, a Federal right spe-"cially set up is denied, and this Court has jurisdic-"tion to review the judgment under Section 709 o fthe "Revised Statutes."

* * * * * * *

Syl. 2:

"Under the provisions of the Constitution which "declare the supremacy of the National Government, "Congress has power to enact, as it has done by Sec-"tions 905 and 906 of the Revised Statutes, that the "same faith and credit be given in the courts of the "States and Territories to public acts, records and

"judicial proceedings of the Territories as are given "to those of the States under Article IV, paragraph "1, of the Constitution."

Text, page 62:

"The territorial law was specially set up in the "case, and was offered in evidence at the trial, and it "was held by the Texas Court that it was not re- "quired to give force and effect to the territorial stat- "utes under the Constitution and laws of the United "States.

"The opinion of the Court of Civil Appeals of "Texas shows that the validity of this statute and "its binding force to control the right of action as- "serted was considered and denied in giving judg- "ment against the plaintiff in error. Such judgment "gives this Court jurisdiction of the case."

Hancock Nat. Bk. vs. Farnum, 176 U. S. 640; *St. L., I. M. & S. R. R. Co. vs. Taylor*, 210 U. S. 281, 293; *Am. Exp. Co. vs. Mullins*, 212 U. S. 311.

Page 65: The passage of an act by a Territory is the exercise of an authority under the United States.

New Mexico ex rel. McLean vs. R. R. Co., 203 U. S. 38, 47:

"Section 906 of the Revised Statutes requires "every Court within the United States to give the "same faith and credit to the acts of the Territory "as they have by law or usage in the courts of the "Territory from which they are taken. The Federal "question then is: Did the Court of Texas, in deny- "ing any force and validity to the New Mexico stat- "ute, violate this requirement of the Federal stat- "ute (Sec. 906), passed under the power conferred "upon Congress by the Constitution?"

Farrell vs. O'Brien, 199 U. S. 89:

Syl. 2:

"As the authority to make wills is derived from "the State, and the requirement of probate is but a "regulation to make the will effective, matters of "**pure** probate, in the strict sense of the words, are "not within the jurisdiction of Courts of the United "States."

Syl. 1:

"Where the jurisdiction of the Circuit Court is "invoked, not only on the ground of diverse citizen- "ship, **but also on a constitutional question,** the mere "averment of the latter is not sufficient if it is so "wanting in merit as to be frivolous; and, under such "circumstances, if an appeal and a petition for *cer- "tiorari* are both pending, as in this case, the appeal "will be dismissed; but, if the correctness of the de- "cree on the general issue should be considered, the "writ will be allowed and the record on appeal treated "as a return thereto."

Syl. 3:

"When a State law, statutory or customary, "gives to the citizens of the State, in an action or "suit *inter partes*, the right to question at law the "probate of a will or to assail a probate in a suit in "equity, the Courts of the United States, in adminis- "tering the rights of citizens of other States or aliens, "will enforce such remedies. The action or suit "*inter partes*, however, must relate to independent "controversies, and not to mere controversies which "may arise on an application to probate or mere "method of procedure ancillary to the original pro- "cedure."

Text, p. 106 (citing from *Broderick's Will case*, 21 U. S. 503):

"There are, it is true, in several decisions of "this Court, expressions of opinion that the 'Federal

" 'Courts have no jurisdiction, referring especially
" 'to the establishment of wills; and such is undoubt-
" 'edly the case under the existing legislation of Con-
" 'gress. The reason lies in the nature of the pro-
" 'ceeding to probate a will as one *in rem*, which does
" 'not **necessarily** involve any controversy between
" 'parties; indeed, in the majority of instances, no
" 'such controversy exists. In its initiation, all per-
" 'sons are cited to appear, whether of the State
" 'where the will is offered or of other States. From
" 'its nature and from **the want of parties,** or the
" 'fact that all the world are parties, the proceeding
" 'is not within the designation of cases at law or in
" 'equity between parties of different States, of which
" 'the Federal Courts have concurrent jurisdiction
" 'with the State Court under the judiciary act; **but**
" '**whenever** a controversy **in a suit between such**
" '**parties** arises respecting the validity or construc-
" 'tion of a will, or **the enforcement of a decree**
" '**admitting it to probate,** there is no more reason
" 'why the Federal Courts should not take jurisdic-
" 'tion of the case than there is that it should not
" 'take jurisdiction of any other controversy between
" 'the parties.' "

In *Gaines vs. Fuentes*, 92 U. S. 10, on writ of error to the Supreme Court of Louisiana, this Court said, through Mr. Justice Field (p. 20):

"There are no separate equity courts in Louisi-
"ana, and suits for the special nature here sought
"are not there designated suits in equity. But they
"are none the less essentially such suits; and if by
"the law obtaining in the State, customary or statu-
"tory, they can be maintained in a State court, what-
"ever designation that court may bear, we think they
"may be maintained by original process in the Fed-
"eral court where parties are, on the one side, citi-

"zens of Louisiana, and on the other side, citizens of "the other States." * * *

Or, *ergo,* in which suits are involved questions as to the validity of the proceedings by virtue of the Constitution and laws of the United States.

Page 21:

"In the case of *Broderick's Will* [92 U. S. 503], "the doctrine is approved, which is established both "in England and in this country, that, by the general "jurisdiction of courts of equity, independent of "statutes, a bill will not lie to set aside a will or its "probate. * * * But that such jurisdiction may "be vested in the State courts of equity by statute "is there recognized, and that, when so vested, the "Federal Courts sitting in the States where such "statutes exist will, also, entertain concurrent juris-"diction in a case between proper parties.

* * * * * * *

Code of Practice of Louisiana, Article 943:

"When a will has been thus proved, the deposi-"tions of witnesses taken in writing shall be con-"sidered good evidence, in case the will be subse-"quently attacked."

The probate and order of execution of a will may be attacked collaterally by anyone in interest.

Sophie vs. Duplessis, 2 La. An. 724; *O'Donegan vs. Knox,* 11 La. Rep. 388.

Proceedings leading to the probate of a will in common form are open to attack from those not made parties thereto upon any grounds that would be sufficient to support an action to establish the nonexistence of the will.

Cox vs. Lea's Heirs, 110 La. 1030.

Western Union Tel. Co., 213 U. S. 52:

Page 53:

"This case comes here from a State court, and, "of course, therefore, it must appear that a Federal "question necessarily was involved in the decision be- "fore this Court can take jurisdiction or udnertake "to reverse the judgment of a tribunal over which "it has no general power. It is not enough that a "right under the Constitution of the United States "was specially set up and claimed; it must be made "manifest either that the right was denied in fact "or that a judgment could not have been rendered "without denying it."

DeSaussure vs. Gaillard, 127 U. S. 216, 234; *Johnson vs. Risk*, 137 U. S. 300-307; *Atchison, etc., Ry. Co. vs. Sowers*, 213 U. S. 55.

Page 62:

"It is contended that there is no jurisdiction in "this Court to entertain this writ of error. But we "are of opinion that there is jurisdiction. The Re- "vised Statutes of the United States, Section 709, "authorize this Court to review final judgments of "the highest Court of the State in which a decision "in the suit could be had where any title, rights, "privilege or immunity under the Federal Constitu- "tion, or under any statute of or authority exercised "under the United States, is specially claimed and "denied."

Respectfully submitted,

CHAS. S. RICE,
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Of Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 151.

ANNA M. BURBANK, Wife of James M. Woodson, and JAMES M. WOODSON, Executors of the Last Will of T. Scott Burbank, and Individually, Plaintiffs in Error,

versus

Mrs. JOSEPHINE ERNST, Legal Tutrix of the Minor Mary Springer Burbank, Defendant in Error.

MEMORANDA OF ARGUMENT AND SUPPLEMENTAL CITATION OF AUTHORITIES.

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1. Judgments of probate courts come within the meaning of those judgments entitled to full faith and credit in other States under the Federal Constitution.

Simmons *vs.* Saul, 138 U. S., —; 34 L. Ed., 1054.

This is subject, of course, to the rule that enquiry may be made into the jurisdiction of the court rendering the judgment.

Thompson *vs.* Whitman, 18 Wall., 457; 21 L. Ed., 897.

2. The only question as to jurisdiction in this case arises upon the question as to the domicile of the testator, Burbank.

If Burbank was domiciled in Texas *at the date of his death* the Texas court had jurisdiction to probate his will, and it is his domicile at the date of his *death*, not the date of the *execution of his will*, which determines the jurisdiction.

"Cyc.," Title "Wills," vol. 40, p. 1245.

3. The right to acquire a domicile in a State is guaranteed by the Federal Constitution and is one of the privileges and immunities which may not be abridged by the States.

Slaughter House cases, 16 Wall., 36; 21 L. Ed., 395.

4. The acquisition of such domicile depends solely upon residence in a State, accompanied with intent or "volition" to make such residence the domicile.

Slaughter House cases, *ubi supra.*
Ennis *vs.* Smith, 14 How., —; 14 L. Ed., 473.
Sharon *vs.* Hill, 26 Fed., 337.
Harding *vs.* Standard Oil Co., 182 Fed., 421.
Wright *vs.* Schneider, 32 Fed., 705.

> "When there has been actual removal with intent to make a permanent residence and the acts of the party correspond with the purpose the change of domicile is completed and the law forces upon him the character of a citizen of the State where he has chosen his domicile, *although he may have formerly* considered himself a citizen of the State he has left." (Italic ours.)
>
> Quoted in Mitchell *vs.* U. S., 21 Wall., 352; 22 L. Ed., 584, from Pac., etc., Co. *vs.* Tompkins, 101 Fed., 531.

The language originated in the opinion of Washington, J., in Butler *vs.* Farnsworth, Fed. Cas. No. 2240, where the further statement is made:

> "It is a conclusion of law upon certain facts, which constitute him a citizen of the State where he permanently resides, which *neither his private intentions nor his public declarations can alter.*" (Italic ours.)

The decision in the instant case reverses the rule and declares a "conclusive presumption" against a change of domicile by reason of former declaration, truthful when made and entirely consistent with a subsequent change of domicile. (Syllabus by the court, Rec., p. 211.)

5. Such *conclusive* presumption is a presumption of law, not a finding of fact.

> "A presumption of law or irrebuttable presumption is a rule of law that a particular inference shall necessarily be drawn from certain established facts."
> Am. & Eng. Enc. Law, Title "Presumptions."

It is submitted that the effect of the State court's decision was to abridge the right of testator to acquire a domicile in Texas, by declaring, as a matter of law, contrary to the actual facts of residence and intention, that he could not acquire a new domicile without an express revocation of his former declaration of intention.

6. No revocation of the procuration was necessary, because it had expired under the statutory provisions authorizing it at the date of the testator's death.

> "Such absence cannot exceed one year" (Op. of State Sup. Ct., instant case, Rec., 210).

The testator left Louisiana early in April, 1909 (Ev. of Woodson, Rec., p. 51; Ev. De Silva, Rec., p. 67).

He never returned to Louisiana, but died in Texas May 10, 1910 (Rec., p. 22).

The procuration (power of attorney) was executed April 8, 1909.

At the date of the testator's death, therefore, the procuration, which is made conclusive upon the question of domicile, had expired by the terms of the law under which it was executed, was *functus officio,* and entitled to no weight whatever as evidence upon the question of domicile.

There was, therefore, no legal evidence to rebut the presumption of domicile arising from conceded actual residence, and the undisputed proof of repeated verbal and written declarations of intent to acquire a domicile in Texas.

In addition to the authorities and argument in the brief for plaintiffs in error the foregoing is

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

United States Supreme Court.

OCTOBER TERM, 1913.

No. 151.

ANNA M. BURBANK, Wife of James M. Woodson, and JAMES M. WOODSON, Executors of the Last Will of T. Scott Burbank, and Individually,
Plaintiffs in Error.

versus

MRS. JOSEPHINE ERNST, Legal Tutrix of the Minor, Mary Springer Burbank,
Defendant in Error.

BRIEF ON BEHALF OF JOSEPHINE ERNST, TUTRIX.

I.

This writ is prosecuted by plaintiffs in error from a judgment rendered in the Supreme Court of Louisiana in October, 1911. There was only one question of fact at issue

—to wit, whether the late T. Scott Burbank was a resident of Texas or of Louisiana at the time he made his last will and at the time of his death in May, 1910.

The Supreme Court of Louisiana decided that on the dates in question the testator was in fact a resident of and domiciled in Louisiana, and that he was not a resident of or domiciled in Texas.

The issue thus decided arose in the manner following, to wit:

On March 22, 1910, Burbank made his will in the City of Temple, State of Texas, declaring therein that he is a resident of that place, which is his permanent home, and that he is a citizen of Texas. He devised his estate to his daughter, the minor Mary Springer Burbank, under certain conditions and depending upon certain events, and, these failing, the estate devolved upon the decedent's two sisters, Mrs. Woodson (one of the plaintiffs herein) and Mrs. Da Silva. He named the former and her husband to be executors of his will (Rec., pp. 17-19), and left the estate in their hands with full control for the period named therein, and subject to the contingencies recited in said will. (Rec., pp. 17-19.)

On May 10, 1910, the testator committed suicide at the residence of his brother-in-law, Woodson, in Temple, Texas.

On June 6, 1910, the Succession of T. Scott Burbank was opened in the Civil District Court of Orleans Parish, at New Orleans, Louisiana, on the petition of Nellie Burbank Dodge, a sister of the decedent, who averred that T. Scott Burbank was at the time of his death, and for many years anterior thereto, a resident and citizen of Louisiana, and domiciled in the City of New Orleans.

That he left a lawful child, Mary Springer Burbank, a minor.

That he left property in the State of Louisiana, consisting of his interest in the succession of his deceased father, in course of administration before said Civil District Court.

That said minor, Mary Springer Burbank, inherited this estate of her deceased father.

That she was without a tutor, and it was necessary that one be appointed.

The prayer of the petitioner was that the Court should convene a family meeting to recommend a person to be appointed tutor; that in due course a tutor be appointed to said mimor, and that an inventory of the estate be made under the direction of the Court. (See Petition, Rec., pp. 1-3.)

In due course and upon the proceedings had on said petition Josephine Ernst, grandmother of the minor Mary Springer Burbank, was on June 17, 1910, appointed legal tutor of the minor, furnishing a bond for $50,000. Letters of Tutorship were duly issued to her on June 20th. (See Judgmemt, Rec., p. 6, and order fixing bond, Rec., p. 12.)

The Letters of Tutorship were not copied in the record, as it was deemed unnecessary and the fact is not disputed.

On June 22, 1910, the plaintiffs in error filed before the Civil District Court at New Orleans, in the Succession of T. Scott Burbank, an ex parte application setting forth that the decedent was a resident of Texas and domiciled there at the time of his death, and that he left an estate partly situated in Texas and partly within the jurisdiction of the Louisiana Court. That his last will, dated March 22, 1910, had been filed and admitted to probate in the County Court of Bell County, Texas, on June 14, 1910, and that the petitioners had

been recognized in said County Court of Bell County, Texas, as the executrix and executor of the last will of T. Scott Burbank, and they annexed to their application a copy of all the proceedings had in said County Court, duly exemplified according to the act of Congress for use in another State.

They further averred that they desired to remove the decedent's Louisiana estate to Texas, to be administered in the County Court of Bell County as the court of primary jurisdiction.

In conclusion they prayed to be recognized by the Louisiana Court as, respectively, the executrix and executor of said last will; that the copy thereof be registered; and that upon the taking of an inventory and the filing of a bond, as required by law, they be recognized as having the power to administer decedent's estate as ancillary to said principal administration. (Rec., pp. 13; 14.)

On the same day—to wit, June 22, 1910—Mrs. Josephine Ernst, legal tutrix of the minor Mary Springer Burbank, filed a pleading in which she opposed the aforesaid *ex parte* application of Woodson and wife. She alleged therein that T. Scott Burbank, the decedent, was at the time of his death a resident of the City of New Orleans, and a citizen of the State of Louisiana, and that he was not a resident of Texas, nor a citizen thereof, nor had he ever been domiciled therein. Other defenses were set up in this pleading—namely, that at the time of the making of the will the decedent was mentally incompetent and unable to make or understand the instrument purporting to be his will; that the will was void for want of form, and, in any event, could not affect the decedent's estate in Louisiana, which was made up of real property of large value.

The tutrix prayed that the alleged will be refused probate and held to be void and of no effect. (Rec., p. 30.)

On June 23, 1910, the probate Judge (Civil District Court) rendered an interlocutory judgment ordering that "the last will and testament of the deceased presented for probate be filed, and that no further action be had herein until further hearing." (Rec., p. 31.)

On June 27, 1910, Mrs. Ernst, tutrix, instituted a direct action in the record of the succession of T. Scott Burbank in the Civil District Court of Orleans Parish, Louisiana, against Woodson and wife, executor and executrix of the Texas will, and against the said persons in their capacities as legatees, and against Mrs. De Silva and Mrs. Dodge, the other legatees, seeking to annul the instrument presented as the last will, on the grounds previously urged in the opposition, and upon the further ground that the said will creates a prohibited substitution and *fidei commissa*, and that the decedent's whole estate is real property situated in Louisiana, and that the decedent was a resident of said State, domiciled therein, and that he never was a resident of or domiciled in any other State.

She prayed that the pretended will of March 22, 1910, be held to be null and void, inoperative and of no effect, and that the minor Mary Springer Burbank be recognized to be the sole heir of her deceased father, the late T. Scott Burbank, and that said minor be sent into possession of his said estate, the said testament to the contrary notwithstanding. (Rec., pp. 31, 32.)

On July 15, 1910, the defendants Woodson and wife and the defendant De Silva filed a joint answer to the foregoing suit, denying the several allegations thereof, and averring, further, that decedent was competent to make the will, and did understand the will, when made; that he was not a citizen of Louisiana at the time of making the same,

but was legally domiciled in Texas, and was not domiciled elsewhere. They further aver that decedent was possessed of large property in Texas and in Louisiana, and that his estate in Louisiana "consisted, and yet consists, of his undivided share and interest in and to the succession of his deceased father, Edward W. Burbank, and his deceased mother, Anna M. Burbank."

The defendants furthermore reiterated the allegations in the *ex parte* application, aforesaid, concerning the admission of said decedent's will to probate in Texas, and they insisted that it was the duty of the Louisiana Court to recognize them as executors, and to grant the relief prayed for in that proceeding. (Rec., pp. 87, 88.)

The exemplified copy of the will and other proceedings had in Texas shows that the will was probated after notice by posting at three places in the County of Bell, Texas (Rec., p. 20), and that the plaintiffs in error, Woodson and wife, were recognized and appointed executor and executrix. (Rec., pp. 22-25.)

The several pleadings of the respective parties herein above detailed were treated as parts of one suit, and the entire issue thus made up was heard and tried before the probate Judge as one suit in fact.

Upon the issues thus raised evidence was adduced in behalf of both parties, and the judgment of the trial Court held that the decedent, T. Scott Burbank, was domiciled in Louisiana, both at the time of the making of the will and at the time of his death, and that the will made by him in Texas is not such as can be registered, executed or given effect in Louisiana, and the demand of the executors was dismissed. (Rec., p. 186.)

The plaintiffs in error thereupon prosecuted a suspensive appeal to the Supreme Court of Louisiana, which heard

the case in due course, and on October 16, 1911, gave judgment holding that the proof established that the decedent was a citizen of Louisiana, and domiciled in that State, at the time of making his will, and at the time of his death.

In the course of the opinion rendered by the Court it is said:

> "It is conceded by counsel on both sides that the validity of the probate of the will in Texas hinges on the question of the domicile of the testator at the date of the confection of the instrument. (*Succession of Drysdale*, 124 La. 266.)"

In considering the evidence adduced pro and con on the question of domicile, the Court in its opinion held that the theory of domicile in Louisiana was supported by the highest proof known to the laws of Louisiana.

The Court said:

> "The highest proof in this State of an intention to change domicile is by a declaration in writing signed by the party making it and registered by the recorder. (Civil Code, 42.) 'In case this declaration is not made, the proof of this intention shall depend upon circumstances.' (Civil Code, 43.) In the case at bar, we have the solemn declaration by Burbank, duly recorded, that he had no intention of changing said domicile opposed by his private declaration and writings made in another State.
>
> "In Louisiana, Burbank posed as an executor temporarily absent from the State of his domicile, while in Temple he represented himself to be a citizen and permanent resident of the State of Texas. Burbank, on the eve of leaving New Orleans in April, 1909, executed his last will by notarial act. About March 12, 1910, he consulted a lawyer in Temple, Texas, stating that he desired to make a will

that would be valid under the laws of Texas. As nearly his whole estate was situated in the State of Louisiana, and as he had already made a will in that State, his evident intent was to dispose of his property in a manner not warranted by the laws of the *situs*. The will made ten days later shows that the intent was to create a trust and a substitution repugnant to the laws of the State of Louisiana. (*Succession of Beauregard*, 49 La. An. 1176; *McCan case*, 48 La. An. 145.) Burbank's declarations of his Texas citizenship, unnecessarily repeated in the will itself, are calculated to create the suspicion that he was making up a fictitious case of domicile. However that may be, such private declarations as to intent are more than counterbalanced by his public declarations of record and his official acts as resident executor in the State of Louisiana.

"It is, therefore, ordered that the judgment of the lower Court be amended by dismissing the proponent's application, as of nonsuit, with costs in both courts."

A rehearing was applied for and denied, and thereupon Anna M. Burbank, wife of James M. Woodson, and James M. Woodson, as testamentary executors of the last will of T. Scott Burbank and individually, prosecuted this writ of error.

II.

The assignment of errors filed with the writ assigns thirteen errors.

The first, second and third assignment of errors are, substantially, that the Court below erred in finding that the deceased, T. Scott Burbank, was without right to change his domicile at will, and was legally disqualified from leaving the State of Louisiana permanently and acquiring a

domicile in the State of Texas without first surrendering his trust as executor of the succession of his deceased father, and because he had, on the contrary, left behind him a power of attorney in Louisiana, executed under the provisions of Article 1154 of the Civil Code of said State, indicating an intention not to leave the State permanently; that all these findings are in derogation of the Fourteenth Amendment to the Constitution of the United States, establishing that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside, and that no State shall deprive any person of life, liberty or property without due process of law; and that said finding is also in derogation of Section 2 of Article V of the Constitution of the United States, establishing that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the United States."

The fourth assignment of error is that the Court erred in refusing to give full faith and credit to the judgment of the Court of probate of Bell County, State of Texas, a competent Court having jurisdiction of the place of domicile of T. Scott Burbank, in derogation of Article IV, Section 1, of the Constitution of the United States.

The fifth assignment of error is that the Court erred in refusing the application of the plaintiffs in error for the registration and execution of the last will and testament of the deceased, T. Scott Burbank, and ordering its execution, it being established by the exemplified copy of the proceedings in the County Court of Bell County, State of Texas, that the said last will and testament had already been duly proved and admitted to probate and execution therein, the said county being the domicile of testator, and where the last will was received.

The sixth assignment is that in this cause and before said Court there was in question the construction of Sections 1 and 2 of the Fourteenth Amendment to the Constitution of the United States, and the decision was against the title, rights and privileges set up and claimed under said clauses of the amendment by the plaintiffs in error.

The seventh and eighth assignments of error are that the Court erred in holding that the deceased was not lawfully domiciled in Temple, Bell County, Texas, and was, on the contrary, lawfully domiciled in Louisiana, at the time of making his will, and at the time of his death.

The ninth assignment of error is that the Court erred in finding that the minor Mary Springer Burbank was domiciled in the State of Louisiana, and not in the State of Texas.

The tenth assignment of error is that the Court erred in disregarding the testimony tending to establish the lawful domicile of decedent to have been in Texas before and at the time of making his will and thereafter to his death.

The eleventh assignment of error is that the Court erred in holding that the estate of T. Scott Burbank was in *custodia legis* in the Parish of Orleans, State of Louisiana, under the lawful administration of Josephine Ernst, as legal tutrix of her granddaughter, Mary Springer Burbank, at the time when the will made, proved and admitted to probate in Texas was presented on June 22, 1910, to the Civil District Court for the Parish of Orleans, State of Louisiana.

The twelfth assignment of error is that the Court erred in finding that the declaration made by the testator in the last will of T. Scott Burbank, executed in Texas on March 22, 1910, wherein he declared that his residence is in the County of Bell, State of Texas, which is his permanent home, and wherein he declared that he is a citizen of

Texas, was an unnecessary repetition in that will, and is calculated to create a suspicion that he was making up a fictitious place of domicile.

The thirteenth assignment of error is that it was wrong for the Court to condemn the executors to pay the costs of the proceedings.

III.

On the issue of fact whether or not the decedent was a resident of the Parish of Orleans, and domiciled in the State of Louisiana, the evidence in the record is carefully analyzed in the opinion of the lower Court, and the lower Court concluded, as we have already noted, that, in the conflict of evidence there presented, the highest and most conclusive evidence established that Burbank had never left the State of Louisiana with the intention of departing permanently, but, on the contrary, had departed with the intention of returning, and that he continuously and consistently maintained that attitude before its Courts, and was at the time of his death in office as executor and administering as executor under a procuration executed under the laws of Louisiana, and pursuant to the laws of that State, declaring that he was absent from the State temporarily, and with the intention to return.

Considering the whole evidence, the Court decided that the preponderance of evidence showed that Burbank's declaration in his will was calculated to create a suspicion that he was making up a fictitious place of domicile, and that his private statements as to his intention were more than counterbalanced by his written and his official declarations of record in Louisiana, and his official acts as resident executor therein.

ARGUMENT.

I.

It seems very clear from the foregoing statement that the plaintiffs in error have misconstrued the findings of the lower Court on the facts, and that, therefore, their construction of the Court's action, as recited in the first, second, third and twelfth assignments of error, is without any substantial foundation. The opinion of the lower Court is very clear and unambiguous, and it establishes beyond peradventure that the Court has examined into the issues of fact regarding the domicile of the decedent and has found as a fact that he was not domiciled in Texas at the time he made his will, or at the time of his death, but, on the contrary, that he was domiciled in the State of Louisiana, and resided therein.

Regarding the fourth, fifth and sixth assignments of error—that the lower Court has not given full faith and credit to the action of the Court of probate of Bell County, State of Texas—it seems a sufficient answer that the Court ordered the exemplified copy of the said proceedings to be filed, but did not grant the relief prayed for by the said executors, because the Court found as a fact that the domicile of the testator was in Louisiana, that his estate consisted entirely of an interest in the successions situated in Louisiana, where such interest is classed as real property, and that the will and probate of the same in Texas, therefore, did not warrant the relief prayed for by the executors, which was that the same should be registered—*i. e.*, admitted to probate—in Louisiana upon the exemplified copy aforesaid, and that the executors should be allowed to take possession as foreign executors for the purpose of trans-

mitting the estate to the alleged court of primary jurisdiction. . .

It is the settled jurisprudence of Louisiana that an undivided interest in a succession is an incorporeal immovable.

See **Weber vs. Oury, 14 La. 537,** and authorities there cited.

The next point to be noticed is that in the ex parte application of the two Texas executors (Rec., p. 13) filed in the Succession of T. Scott Burbank in the Civil District Court for the Parish of Orleans, Louisiana, said executors alleged *ex industria* that "said T. Scott Burbank, late a resident of, domiciled in and a citizen of the State of Texas, departed this life in said City of Temple on, say, the 10th day of May, 1910, leaving an estate and property situated partly in said State of Texas and partly in the State of Louisiana within the jurisdiction of this Honorable Court."

This allegation is followed by the allegation that the decedent left his last will, etc. (Rec., p. 13.)

Now, the foregoing allegation of fact—namely, the domicile of Burbank in the State of Texas—was an affirmative allegation over, above and beyond the allegation regarding the making of a will, the probate thereof, etc., and in answer to the application, the minor, through her tutrix, challenged the fact of domicile and averred to the contrary that the decedent was in fact a citizen of and domiciled in the State of Louisiana and a resident of the City of New Orleans at the time and under the circumstances aforesaid. (Rec., p. 30.)

The same defense was set up in the direct action by the minor already recited. (Rec., p. 31.)

Upon the issue of fact provoked by the executors in the Louisiana court, they were fully heard in the regular course of judicial proceedings and the adjudication by that Court of the plaintiffs' claims is due process of law under the settled jurisprudence of this Court.

Central Land Co. vs. Laidly, 159 U. S. 103;
Morley vs. Lake Shore Co., 146 U. S. 162.

This disposes of the first, second and third assignments of error.

II.

The point covered by the fourth, fifth and sixth assignments of error, that the Louisiana Court has failed to give full faith and credit to the judgment of the Probate Court of Bell County, Texas, is fully answered by the decision in **Andrews vs. Andrews, 188 U. S. 14,** and the authorities there cited.

The words of Chief Justice Marshall in **Rose vs. Himely, 4 Cranch, 241-269 (U. S.),** have been consecrated in our jurisprudence.

> "Upon principle it would seem that the operation of every judgment must depend on the power of the Court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined."

We have seen that the issue of domicile in Texas *vel non* was tendered by the executors in their appearance in the Louisiana court and challenged there by the minor and determined against the executors and in favor of the Louisiana domicile.

If the decedent was domiciled in Louisiana, then the Texas court was without primary jurisdiction and could only entertain an ancillary jurisdiction; the principal administration of the estate belonged to the Louisiana court, where the real property lay, and this Court was seized of jurisdiction by virtue of the law of Louisiana and by virtue of the fact that its officer (the tutrix) was already in possession of the same under due appointment and qualification.

It will be borne in mind that no attack has yet been made on that appointment—the sole and only question presented was whether, by the mere presentation of this exemplified copy of the proceedings in the Texas court, it became the duty of the Louisiana court to register this exemplified copy and to place the executors in possession of the estate, but the question of jurisdiction of the Texas court was across the path and had to be disposed of in favor of the executors before the court of Louisiana could comply with their wishes.

In Louisiana, the succession of T. Scott Burbank becomes open by death.

Article 934 of the Civil Code of Louisiana says:

> "The succession, either testamentary or legal or irregular, **becomes open** by death or presumption of death caused by long absence in the cases established by law."

If Burbank was a resident of Louisiana, the legal proceedings were properly taken in the Parish of Orleans, the place of his domicile, and the place, also, where his estate is situated.

Article 935 of the Louisiana Civil Code says:

> "The place of the opening of successions is fixed as follows:
>
> "In the parish where the deceased resided, if he had a fixed domicile or residence in this State.
>
> "In the parish where the deceased owned immovable property, if he had neither domicile nor residence in this State, or in the parish in which it appears by the inventory his principal effects are, if he have effects in different parishes.
>
> "In the parish in which deceased has died, if he had no fixed residence, nor any immovable effects within this State, at the time of his death."

If Burbank was a nonresident of Louisiana, the legal proceedings were nevertheless properly taken in Louisiana, in the parish where he left property.

Article 1220 of the Louisiana Civil Code says:

> "The successions of persons domiciliated out of the State of Louisiana, and leaving property in this State at their demise, shall be opened and administered upon as are those of the citizens of the State; and the Judge before whom such succession shall be opened shall proceed to the appointment or confirmation of the officer to administer it under the name and in the manner pointed out by the existing laws."

It is settled in Louisiana that a will made by a resident of Louisiana in a foreign State may be probated in Louisiana upon the production of the **original will**, provided the same be clothed with all the formalities prescribed for the validity of wills in the place where they have been respectively made.

> **Successions of Drysdale, 121 La. 816-843,** and authorities there cited; see, also, the same case in **124 La. 266, 267.**

On the other hand, a foreign will operating on property in Louisiana must be registered in that State in the Court within whose jurisdiction the property is situated and the execution thereof ordered by the Judge, upon exemplified copy, etc.; but notice of the application to register and execute must be given to the legal heirs and an opportunity given to them to make such objections and exceptions thereto as they may be entitled to make in the premises.

Succession of Drysdale, 121 La., 837-839.

The Texas will was in substance obnoxious to the public policy of Louisiana in that it created a substitution and a *fidei commissum*. Besides this, the will leaves the entire estate in the hands of the executors, vesting them with absolute control of the same and authorizing them to dispose thereof.

They are dispensed from making any inventory, and are authorized to sell, mortgage or hypothecate any of the lands, premises or property of the estate, and to change investments, and reinvest the same, as in their judgment may seem best.

The estate is to remain in the possession of the executors during the entire period fixed in the will, which, roughly, is until the child attains the age of thirty years; and during that period, the possession remaining in the executors, they shall advance to the guardian such sum as they deem fit, necessary or proper for the maintenance of the child.

When the child arrives at the age of twenty-one years, the executors shall deliver to her twenty thousand dollars out of the estate; when she reaches twenty-five, they shall deliver to her one-half of the remainder of the estate; and when she reaches thirty years of age, they shall deliver to her the remainder of the estate. (See will, Rec., p. 17.)

It is well settled under our jurisprudence that no such powers can be conferred upon executors, and the minor is, therefore, entitled to take this Louisiana estate free from those provisions of the will.

See **Succession of McCan, 48 La. An. 145; Succession of Beauregard, 49 La. An. 1176.**

The entire estate of T. Scott Burbank in Louisiana is composed of his inheritance from his deceased father and mother, held at the time of his death in indivision with three coheirs—his sisters, the Mesdames Woodson, De Silva and Dodge.

This undivided inheritance, it is well settled in Louisiana, is an immovable—is real property.

See **Weber vs. Ory, 14 La. An. 537.**

And, consequently, falls, under the laws of Louisiana, to his minor child, free from the trust imposed upon it by the Texas will.

Article 491 of the Louisiana Civil Code says:

> "Perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner, provided it is not in any way prohibited by laws or ordinances.
>
> "Persons who reside out of the State cannot dispose of the property they possess here in a manner different from that prescribed by its laws."

The only exception to this rule is as to movables.

Article 10 of the Louisiana Civil Code says:

> "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.
>
> "But the effect of acts passed in one country to have effect in another country is regulated by the laws of the country where such acts are to have effect.

"The exception made in the second paragraph of this article does not hold when a citizen of another State of the Union, or a citizen or subject of a foreign State or country, disposes, by will or testament, or by any other act *mortis causa*, made out of this State, of his **movable property** situated in this State, if at the time of making said will or testament, or any other act *mortis causa*, and at the time of his death, he resides and is domiciliated out of this State."

III.

The questions raised by the seventh, eighth, ninth, tenth and twelfth assignments of error seem to be equally well settled. These assignments are that the Court below erred in finding (as it did from the evidence) that T. Scott Burbank was not domiciled in Texas, but was domiciled in Louisiana.

These are questions of fact, and we take it to be well settled that the only appellate jurisdiction conferred by Congress upon the Supreme Court to review the judgments or decrees, at law or in equity, of the highest Court of a State is by writ of error, and on writ of error nothing is removed for re-examination but questions of law arising upon the record. The findings of fact made in the Supreme Court of the State will be the basis of the decision of the Supreme Court.

Quimby vs. Boyd, 128 U. S. 439; Dowder vs. Richards, 151 U. S. 658; Egan vs. Hart, 165 U. S. 188; Thayer vs. Spratt, 189 U. S. 346; Adams vs. Church, 193 U. S. 510; Clipper Min. Co. vs. Eli Min. and Land Co., 194 U. S. 220; Republican River Bridge Co. vs. Kansas P. R. Co., 92 U. S. 315.

IV.

The eleventh assignment of error is also based upon an error of fact, as we have shown in the preceding pages. The succession of Burbank was open in Louisiana by the mere fact of death and the appointment and qualification of the tutrix vested the custody of the property thereof in the tutrix, represting the minor. This is an incontestable fact, established by the record, and so found by the lower Court.

V.

The question raised by the thirteenth assignment, as to the taxation of costs against the executors, is a matter of local practice, with which this writ of error is not concerned.

We submit, therefore, that the writ of error raises no questions over which this Court should take jurisdiction; but, if there is jurisdiction, we submit, nevertheless, there is no merit in the contentions of the plaintiffs in error, and the writ should be dismissed.

Respectfully submitted,

HENRY P. DART,
Attorney for Josephine Ernst, Tutrix.

Office Supreme Court, U. S.
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JAMES D. MAHER
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 151.

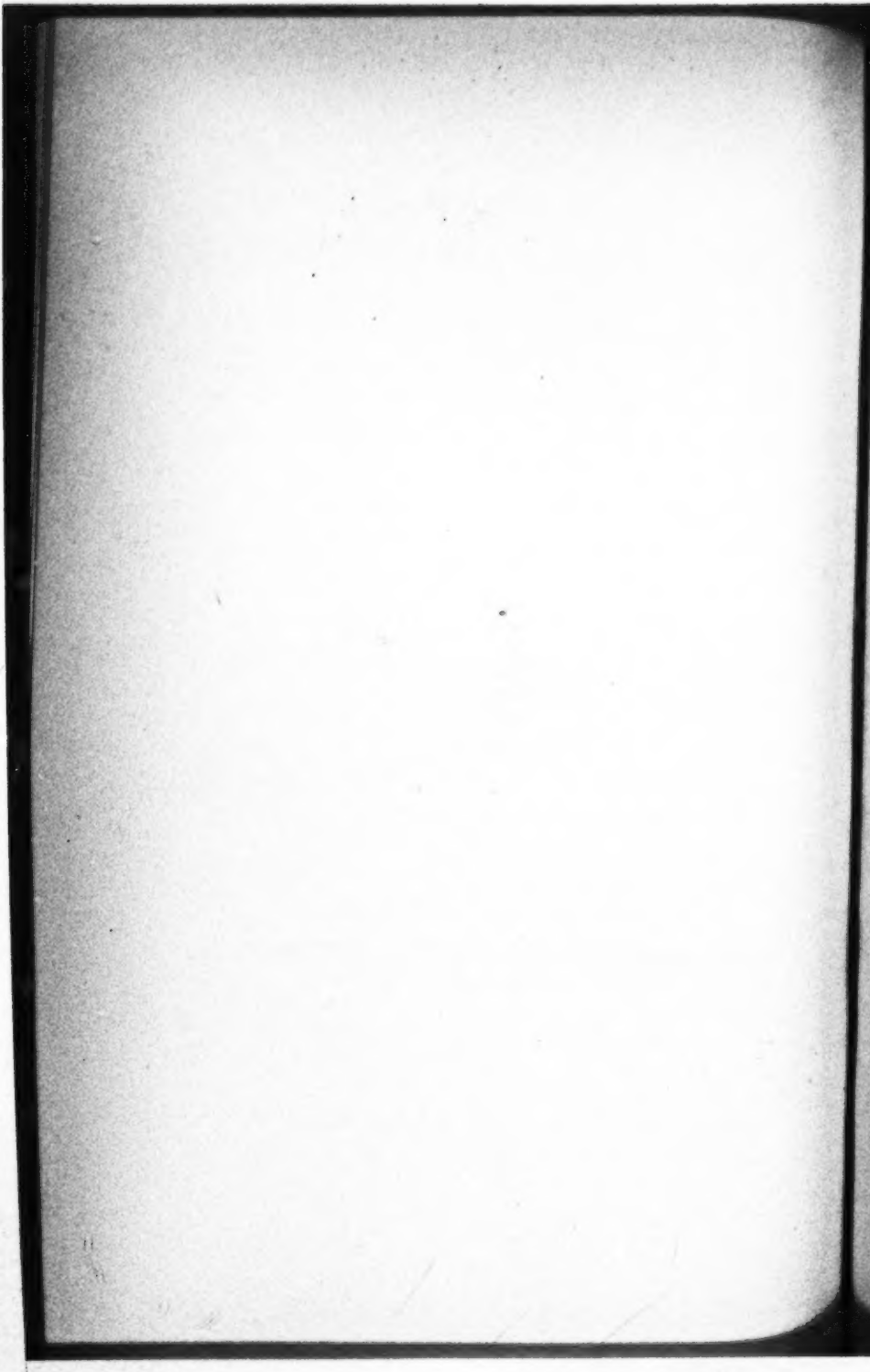
ANNA M. BURBANK, WIFE OF JAMES M. WOODSON, AND JAMES M. WOODSON, EXECUTORS OF THE LAST WILL OF T. SCOTT BURBANK, AND INDIVIDUALLY, PLAINTIFFS IN ERROR,

versus

MRS. JOSEPHINE ERNST, LEGAL TUTRIX OF THE MINOR MARY SPRINGER BURBANK, DEFENDANT IN ERROR.

ADDITIONAL AUTHORITIES FOR DEFENDANT IN ERROR.

HENRY P. DART,
Attorney for Defendant in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 151.

ANNA M. BURBANK, WIFE OF J. M. WOODSON, AND J. M. WOODSON, EXECUTORS, &c.,

vs.

JOSEPHINE ERNST, LEGAL TUTRIX OF THE MINOR, MARY SPRINGER BURBANK.

ADDITIONAL AUTHORITIES FOR DEFENDANT IN ERROR.

1. Regarding point No. 6, page 3, in the "supplemental citation of authorities and arguments for plaintiffs in error."

It is well settled in Louisiana that absence beyond a year creates a right of action to remove the executor from office; he does not become *functus officio*.

Of course, in such action he has all the usual rights of a defendant in any action, including the rights to explain or excuse his absence.

See Civil Code of La., Articles 1153, 1154, 1158, and 1160.

Code of Practice of La., Articles 1018, 1019.

Also Clement & Tremoulet *vs.* Sigur, 29 La. An., 799-800.

A collateral attack is never allowed in Louisiana against the capacity of an executor, tutor, or other officer holding letters of office unrevoked.

Succession of Hawkins, 35 La. An., 591.
Davis *vs.* Greve, 32 La. An., 425.

2. Good faith is a primary element in all efforts to establish a domicile, and one of the other essentials is that it is absolutely necessary that the domicile of origin be abandoned *animo revertendi;* you cannot abandon it with a string tied to it, so to speak, by which you can pull yourself back to the shelter of that domicile if occasion arise.

See Cole *vs.* Lucas, 2 La. An. Rep., 950.

In this case the agent named by the executor was one of his counsel and a member of the bar of Louisiana; he took that procuration, filed it, complied with all the requisites of the Louisiana law to retain in his principal the executorship of the estate, and he actually so represented him during all the ensuing absence and down to the day of the executor's death. This attorney and agent swore before the trial court that while Burbank was executing the procuration, he told him (the agent) "that he didn't intend to return to New Orleans UNLESS it was necessary for him in the settlement of the succession of his father."

Re 116, at head of page.

That succession, we may remark parenthetically, was not settled at the time of T. Scott Burbank's death.

Alongside these declarations, oral and written, we put the fact that besides being represented at all trials in New Orleans as an executor temporarily absent, Burbank actively exercised the most important function of his office in person. All monies paid out for account of the estate were so paid by Burbank on his official check signed by him; Burbank also held during the whole period the possession and control

of the estate in Louisiana. He never released his hold upon that estate until death released it.

See Watson *vs.* Bondurant, 30 La. Ann. Rep., 1.

3. The Supreme Court of Louisiana re-examines the facts in all cases. In this case that court had before it all the oral and documentary evidence adduced in the trial court. The arguments at the bar ranged over all the issues of fact, including the questions of credibility of the witnesses, the improbability of the matters recited by such witnesses, and their interest in the results of the litigation. Among other contents there was a destructive analysis of the Texas depositions tending to show that the whole deposition was conceived by one brain, expressed in the same words, and stating the same ideas. It was shown by comparison that the ORIGINAL deposition, which the others followed blindly in words, form of expression, thought, etc., was a deposition of the counsel who conceived the Texas will, and it was palpable that the entire deposition, covering many witnesses, was written in his office by the pen of one of the witnesses—the typewriter in his office, who evidently thought it too laborious and quite unnecessary to make the witnesses speak in their own tongues. We have accordingly the spectacle of eighteen persons in different stations of life apparently expressing their thoughts in precisely the same words—a unanimity quite startling to even the most hardened student of facts.

In like manner the whole issue was threshed out and the whole case was presented on facts and law. The conclusion reached thereon by the Supreme Court of Louisiana is its conclusions of fact resulting from this study and appreciation of all the evidence. In short, while testing out the primary facts, that court has balanced declarations made in one place against declarations made in another; has considered the probabilities of good faith, of real intent and object, and the court has reached a final conclusion of fact: that one set of actions, one course of conduct, one element of proof outweighs another set of actions, another

course of conduct, and another element of proof. The Louisiana court has in this way closed the issue of fact.

For this court to go behind that conclusion of fact would require the examination by you of the record back of the opinion of the Louisiana court, and an examination also of the testimony, oral and documentary, with which that record is filled. To make up a conclusion you would have to go into the facts developed, *pro* and *con*, and, necessarily, you would have to reach a new conclusion of fact to which to apply this Federal question, which does not apply to the conclusion of facts reached by the Louisiana court.

4. Regarding the point raised in the plaintiffs' reply argument, it is true that a foreign executor qualifying in Louisiana gives a bond as executor. This results from his non-residency.

Succession of Bodenheimer, 35 A., 1034.

Such bond would be for one-fourth over the amount of the inventory of the estate, bad debts excluded (La. Civil Code, Art. 1127). It would be the usual bond covering the administration of an executor, and of course would not be a bond against the removal of the property from the State.

I do not presently recall any statute or decision in Louisiana which requires a bond for the removal of property from the ancillary to the primary state; on the contrary, I believe it a matter of discretion after proof that the debts have been paid, etc.

See Succession of Myra Clark Gaines, 46 La. Ann. Reps., 252.

Respectfully submitted,

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JANUARY 16, 1914.